CASINO REINVESTMENT DEVELOPMENT AUTHORITY, a public corporate body of the State of New Jersey,

Plaintiff/Appellant/Cross-Respondent,

v.

CHARLES BIRNBAUM; LUCINDA BIRNBAUM; LOUISE TAYLOR DAVIS; GERALD GITTENS; THE ATLANTIC CITY MUNICIPAL UTILITIES AUTHORITY; THE ATLANTIC CITY SEWERAGE CO.; and THE CITY OF ATLANTIC CITY,

Defendants/Respondents/Cross-Appellants.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-000019-16

CIVIL ACTION

ON CROSS-APPEAL FROM:
SUPERIOR COURT OF NEW JERSEY,
ATLANTIC COUNTY, LAW DIVISION,
ATL-L-589-14

JUDGMENT ENTERED: DENIAL OF AUTHORITY TO CONDEMN

SAT BELOW:
HONORABLE JULIO L. MENDEZ,
A.J.S.C.

BRIEF AND APPENDIX OF DEFENDANTS/RESPONDENTS/CROSS-APPELLANTS CHARLES AND LUCINDA BIRNBAUM

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PRELIMINARY STATEMENT

This appeal is relatively simple: The court below determined, after hearing testimony from both sides, that there was no reasonable likelihood that the property the Casino Reinvestment Development Authority (CRDA) seeks to condemn in this action would actually be put to a public use, and it therefore denied CRDA's application to condemn the property. **Without appealing this factual finding**, CRDA asks this Court to allow the condemnation to proceed and hold that New Jersey law allows a condemnor to take property even if that property cannot reasonably be expected to be put to a public use. CRDA provides no basis for adopting such a legal rule, and indeed there is no reason this Court should adopt such a rule. That, alone, is dispositive, and this Court need go no further.

The background of this case, however, is slightly more complicated. More than four years ago, CRDA authorized the use of eminent domain to acquire a group of properties in Atlantic City's South Inlet in order to facilitate development that would "complement the new Revel Casino and Resort." At the very edge of that group was the longtime family home Defendant/Cross-Appellant Charles Birnbaum inherited from his parents. Unwilling to part with the home for sentimental reasons, Birnbaum and his wife, Defendant/Cross-Appellant Lucinda Birnbaum, opposed the condemnations. They opposed them because (in addition to the legal flaws ultimately accepted in the court's opinion):

- CRDA had failed to articulate a sufficiently specific

"public use" for their property to justify a condemnation;

- CRDA was attempting to use eminent domain for private redevelopment without meeting the requirements of the New Jersey Constitution's Blighted Areas Clause;
- CRDA had not established that the Birnbaums' property was actually necessary to accomplish any public use;
- CRDA had not met the "public use" requirements of either New Jersey law or federal constitutional law.

Because the court below rejected each of these legal arguments before denying the condemnation on the grounds that CRDA had no reasonable likelihood of achieving its stated ends, each of these arguments is an independent basis to affirm the ruling below.

In sum, this Court has a series of independent bases on which it could affirm the decision below. The decision below can be affirmed because the court correctly found that CRDA was abusing its discretion by pressing forward with condemnation even though the factual circumstances that undergirded its original decision to condemn had evaporated and even though it had no reasonable prospect of actually achieving its asserted ends. The decision below can be affirmed because CRDA's initial complaint sought to condemn the Birnbaums' property for reasons so broad and vague that they could not possibly support the exercise of the eminent-domain power. The decision below can be affirmed because CRDA's plan is to turn the Birnbaums' property over to a

private developer who it believes will put the property to better use — something that categorically cannot be done in New Jersey without meeting the requirements of the Blighted Areas Clause (which CRDA has not done here). The decision below can be affirmed because the Birnbaums' property is not actually necessary to achieve any of CRDA's stated ends. The decision below can be affirmed because CRDA's condemnation here violates both New Jersey law requiring courts to ensure that takings do not primarily benefit private interests and federal law authorizing economic-development takings only where a condemnor has engaged in a degree of careful planning that is entirely absent here. For any or all of these reasons, the court's order rejecting this condemnation should be affirmed.

PROCEDURAL HISTORY

CRDA filed its initial Complaint, Declaration of Taking, and Order to Show Cause seeking to acquire a number of properties (including the Birnbaums' property) by eminent domain on February 11, 2014. Pa1-6.[1] The Birnbaums timely responded to the Order to Show Cause, seeking discovery and to have the complaint dismissed. Pa199. On June 24, 2014, the court below denied the Birnbaums' request for discovery without prejudice. Pa634-36. On November 17, 2014, the court below denied the motion to dismiss, rejected the Birnbaums' arguments, and granted CRDA's request to take the Birnbaums' property. Pa772-799. On November

[1] Citations to "Pa" refer to the Plaintiff/Appellant's Appendix (as corrected). Citations to Defendant/Respondent's Appendix, attached hereto, are designated as "Ra."

25, 2014, the Birnbaums timely filed a Motion for Reconsideration which the Court granted (in part) on August 19, 2015. Pa836-845.

In granting (in part) the Birnbaums' Motion for Reconsideration, the court held that "our Legislature did not intend, and the Constitution does not permit, property to be acquired and to remain idle indefinitely, without a reasonable assurance that the proposed plan to justify the taking will be implemented." Pa843-44. The court's opinion took note of a series of factual circumstances — the unprecedented uncertainty regarding the political future of Atlantic City, the uncertainty regarding the continued funding of CRDA itself, the many competing plans for revitalizing Atlantic City, and the location of the Birnbaums' property in the shadow of the closed Revel Casino and in an area filled with "large parcels of land that have remained vacant for many years." Pa841-45. The combination of these factors gave the court below concern that "if the condemnation is granted, the Birnbaums' property could sit idle in a corner of Atlantic City waiting for years for the plan to come to fruition." Pa840. In light of this concern, the court gave the CRDA "180 days to reevaluate the feasibility of the proposed project and to file an application with evidence to provide this Court with reasonable assurances that the project will be implemented, justifying the taking [of] the Birnbaum property." Pa845. On December 17, 2015, CRDA filed a brief supplemental certification from its attorney, Paul G. Weiss, which reiterated CRDA's intention to condemn the Birnbaums'

property in reliance on the 2012 resolution that approved the Project. Pa846-851.

On April 26, 2016, the court held an evidentiary hearing to evaluate whether, in light of the circumstances listed in its August 19 opinion, there was a reasonable likelihood that CRDA would be able to put the Birnbaums' property to a public use. (Pa953-1007. After that hearing, on August 5, 2016, the court below issued an order finding as a matter of fact that there was no reasonable likelihood of the Birnbaums' property being used for a public use, denying the condemnation and dismissing the Complaint in this action. Pa1066-1078. CRDA timely appealed on August 31, 2016, and on September 15, 2016, the Birnbaums timely cross-appealed the November 17, 2014 Order in which their other legal objections to the condemnation had been denied. Ra1-Ra13.

STATEMENT OF FACTS

For almost 50 years, Charles Birnbaum's family has owned a home at 311 Oriental Avenue in Atlantic City. Pa1068. In 1969, his parents purchased the property, which is made up of three different apartments. Id. Until 1987, Charles Birnbaum's parents lived in the second-floor apartment, and, from 1987 until 1998, his mother lived in the first-floor apartment with her live-in caretaker companion. Id.; see also Pa371-72. Then tragedy struck: In November 1998, an intruder murdered Charles's mother and his mother's live-in caretaker in the first-floor apartment. Pa1068-69 .

But this tragic turn did not eliminate Charles's emotional

attachment to the longtime family home; it strengthened it. Charles converted the first-floor apartment into a piano studio and a memorial to his parents and their love of music. Pa1069. That memorial also serves as the base of operations for Charles's piano-tuning business. Pa1069; see also Pa372. The second and third floor apartments are both occupied as well, rented to two longtime tenants. Pa1069.

On January 10, 2011, New Jersey enacted the Atlantic City Tourism District Act, N.J.S.A. 5:12-218 et seq., which charges CRDA with creating a tourism district within Atlantic City and developing a master plan to establish goals, policies, needs, and improvement of the tourism district. N.J.S.A. 5:12-219(g). In creating this plan, CRDA was instructed to "place special emphasis upon the following:

> (1) the facilitation, **with minimal government direction**, of the investment of private capital in the tourism district in a manner that promotes economic development;
>
> (2) making use of marina facilities in a way that increases economic activity;
>
> (3) the development of the boardwalk area;
>
> (4) the development of the Marina District; and
>
> (5) the development of nongaming, family centered tourism related activities such as amusement parks."
>
> [N.J.S.A. 5:12-219(h), emphasis added.]

Nothing in the Tourism District Act mentions condemnation or eminent domain.

In response to the Tourism District Act, CRDA adopted a Tourism District Master Plan by Resolutions 12-14 and 12-23. Pa1069. Subsequently, at a public meeting on June 19, 2012, CRDA

adopted Resolution 12-82, the South Inlet Mixed Use Development Project (the "Project"), which authorized CRDA's executive director to acquire properties within the Project area, including through the use of eminent domain. Id. In adopting Resolution 12-82, CRDA described the Project as creating development that would "complement the new Revel Casino and assist with the demands created by the resort." Pa899; see also Pa1026,30:5-30:10. The Birnbaums' property is located at the very far edge of the properties located within the Project area; while most of the Birnbaums' block was not slated for acquisition, the Birnbaums' property was. See Pa900; Pa916; Pa1059-1060.

Almost two years later, on February 11, 2014, CRDA filed a verified complaint in condemnation seeking to take title to the Birnbaums' property (while simultaneously seeking to condemn several other properties not part of the current appeal). Pa1-6. The Birnbaums opposed the taking, seeking either to have the complaint dismissed or to convert the proceedings into a plenary hearing so they could take discovery. Pa199. The court below initially rejected the Birnbaums' requests and issued a written opinion holding that the CRDA was authorized to exercise the power of eminent domain to take the Birnbaums' property. Pa772-799.

The Birnbaums filed a motion for reconsideration, which – "[a]fter much reflection, particularly in light of the unprecedented financial crisis involving Atlantic City and the

economic downturn, and upon a further review of all the facts and legal issues" (Pa1070) — the court granted in part on August 19, 2015. Pa836-845.

In granting the motion for reconsideration, the court below noted that the facts on the ground had changed a great deal since CRDA's authorization of the Project in June of 2012 — not least of which was that the Revel Casino, the enterprise that the Project was meant to complement, had gone out of business. Pa843. The court identified four key areas of concern:

a. Governor Christie had proposed reforms that would significantly alter how Atlantic City and CRDA functioned (Pa841-843);

b. CRDA's revenues (and its ability to subsidize development of the Project) had substantially decreased (Pa841);

c. Atlantic City itself had suffered a serious economic downturn, with four casinos closing and many different plans to revive the city under consideration, increasing the uncertainty regarding what plan would ultimately be pursued (Id.); and

d. the Birnbaums' property itself was unique in that it sat "in the shadows of the now closed Revel Casino and in very close proximity to the also closed Showboat casino . . . within an area that has experienced many unsuccessful and unfulfilled revitalization plans," surrounded by many "large parcels of land that have

remained vacant for many years." Pa843.

In light of all this, the court below gave CRDA "180 days to reevaluate the feasibility of the proposed project and to file an application with evidence to provide this Court with reasonable assurances that the project will be implemented, justifying the taking [of] the Birnbaum property." Pa845. Before the expiration of that period, CRDA filed a supplemental certification from its attorney reaffirming CRDA's intention to condemn the Birnbaums' property based on the determinations in the 2012 resolution authorizing the Project. Pa846-851. As a result, the court held an evidentiary hearing to determine whether there was a reasonable basis to believe the Birnbaums' property would be put to a public use if condemned in service of CRDA's 2012 Project. Pa1068.

Although the August 19 order specifically instructed CRDA to reevaluate the feasibility of the proposed project, CRDA – remarkably – refused to do so. CRDA's then-director John Palmieri testified CRDA had taken no steps whatsoever to evaluate the continuing viability of the Project. Palmieri candidly testified that, while CRDA had reconsidered some redevelopment projects in light of the very concerns identified by the judge in this case – and had, in fact, altered some projects in light of economic and financial concerns – CRDA had done nothing to evaluate whether the Project adopted in 2012 continued to make sense in light of all the changes in the ensuing four years. Pa1031-1034, 40:22-46:2. In other words, it is **not** the case that

CRDA officials examined the various ways in which circumstances had changed since 2012 and determined that the Project was still reasonably viable. The judge in this case explicitly ordered them to do so, and they declined.

All the testimony presented at the evidentiary hearing held below only served to reinforce the court's stated concerns. While several CRDA employees testified that CRDA had sufficient funding to complete the "Project," they uniformly confirmed that all they meant by this was that they had funding to complete the part of the project that involved acquiring the Birnbaums' land and demolishing the home that sits on it. Pa1045-46, 69:14-70:12; Pa1053, 84:5-84:24. No one testified that CRDA had or would have money to subsidize development on the site – even though CRDA officials testified that CRDA routinely needs to expend money to "incentivize" development in Atlantic City. Pa1030-31, 39:16-41:1. Although CRDA officials testified generally about their intention to request proposals from developers, no such requests for proposals were in evidence and CRDA's own director of planning had candidly confessed to the public that, with respect to the Birnbaums' property and others in the South inlet, the best he could say was that CRDA was "waiting for the right project to come along." Pa1055, 89:8-89:22.

Indeed, the evidentiary hearing only provided more reason to doubt that there was any reasonable likelihood of the Birnbaums' property being put to any use at all. For example, CRDA's

massing plan for the area — an architectural document from May 2014 meant to guide CRDA in redeveloping the South Inlet — was entered into evidence. That plan included a color-coded map, on which most of the properties that CRDA had already condemned in furtherance of the Project were colored in orange and marked "OUR SITE," but on which the Birnbaums' property was colored in magenta — a color designated on the map as meaning "FUTURE DEVELOPMENT." Pa1059-1060, 97:15-99:20; see also Pa916. Significantly, of the several areas designated for "FUTURE DEVELOPMENT" on CRDA's massing plan, the Birnbaums' is the only one CRDA currently seeks to acquire. Compare Pa916 with Pa900.

The evidentiary hearing also made clear that CRDA staff had originally (in 2012) intended to use funds derived from the Revel Casino to pay for various aspects of the Project. Pa1026, 30:11-31:24; see also Pa1028-29, 34:23-36:24. And, again, CRDA officials testified about the kinds of things projects like these need funding for, including the fact that CRDA sometimes needs to provide cash incentives to developers in order to spark development in areas where development would otherwise not occur. Pa1030-31, 39:16-41:1. By the time of the evidentiary hearing, though, those intended funds were gone: The Revel had ceased to generate any funds at all. Pa1029, 36:22-37:3.

Finally, the evidentiary hearing confirmed that the Birnbaums' property was surrounded by long-vacant land. CRDA's then-director testified that CRDA had recently provided $15 million in funding to subsidize a development just a few blocks

away from the Birnbaums on a large parcel of land that had been vacant for literally decades. Pa1031-1034, 40:22-46:13. And Charles Birnbaum himself testified that his longtime family home sits across the street from a different large swath of land that has sat vacant for years on end. Pa1060-61, 99:21-100:9. Indeed, the vacant land across the street from the Birnbaums' property was actually sold at a bankruptcy auction in the midst of this litigation — but CRDA did not attempt to acquire it. Pa706-07.

In the wake of that hearing, CRDA's ability to implement the Project was even further undermined by the adoption of the Municipal Stabilization and Recovery Act, S 1711/A-2569,[2] and the Casino Property Tax Stabilization Act, S-1715/A-2570[3] — New Jersey's legislative attempts to rescue Atlantic City from its "unprecedented financial crisis." Pa1076-77; Pa1086. After supplemental briefing from the parties, the court took notice of the relevance of these legislative changes. Id. The Casino Property Tax Stabilization Act diverted a substantial portion of CRDA's revenue away from CRDA and towards Atlantic City itself. And the Municipal Stabilization and Recovery Act created even more problems: It required Atlantic City to adopt a five-year recovery plan, which would be reviewed by the Commissioner of Community Affairs. Pa1078. If the Commissioner rejected that plan, significant portions of Atlantic City's governance would be

[2] Codified in relevant part at N.J.S.A. 52:27BBBB-19(f).

[3] Codified in relevant part at N.J.S.A. 52:27BBBB-25.

taken over by New Jersey officials.[4] As the court noted:

> If the CRDA's plans for the Birnbaums' property do not fit with the City's, or the State's, economic development plans, then those plans will not be implemented. This all adds up to great uncertainty surrounding Atlantic City, and at this time that uncertainty renders the implementation of plans for the south inlet area unlikely.
> [Pa1078.]

In light of all this evidence – that CRDA was seeking to condemn the Birnbaums' property despite having lost the business (the Revel Casino) that it had originally planned to complement through the Project, despite having lost the revenue source it had originally intended to use to fund the Project, despite having lost any reasonable expectations regarding Atlantic City's (or its own) political future, and despite the Birnbaums' property being smack in the middle of huge swaths of land that had been proved to be unable to attract development in the absence of major financial subsidies from CRDA that would not be available for the Project – the court below concluded as a matter of fact that there was no reasonable likelihood that CRDA would be able to put the Birnbaums' property to CRDA's asserted public use. Pa1068-1078.

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[4] Subsequent to the court's ruling in this case, the Commissioner rejected Atlantic City's proposed recovery plan and the State of New Jersey asserted significant control over Atlantic City's governance. See Department of Community Affairs, Review of City of Atlantic City's Recovery Plan Pursuant to the Municipal Stabilization and Recovery Act (November 1, 2016), available at http://www.nj.gov/dca/news/pdf/atlantic_city_recovery_plan_2016.pdf. While not necessary to the resolution of this appeal, the eventual decision on the Commissioner is a decision of a government agency of which this Court can take judicial notice if need be.

Simply put, while the court below did not reconsider its initial holding that the Project adopted in 2012 pursued a valid public use, it found as a matter of fact that "such a project does not exist at this time." Pa1076. This appeal followed.

LEGAL ARGUMENT

The opinion below is premised on a legal holding and a factual conclusion, and CRDA has failed to even ask this Court to overturn either one. The court's legal holding was that "our Legislature did not intend, and the Constitution does not permit, property to be acquired and to remain idle indefinitely, without a reasonable assurance that the proposed plan to justify the taking will be implemented." Pa1072; Pa843-44. Instead of addressing this holding, however, CRDA's appellate brief focuses entirely on distinguishing a different Superior Court case — Casino Reinvestment Development Authority v. Banin, 320 N.J. Super. 342 (L. Div. 1998) — that the court below expressly refused to follow. The court's factual finding was that, based on the testimony and evidence presented, there was no "reasonable assurance that the Birnbaums' property will be put to some public use within a reasonable time period." Pa1078. CRDA simply failed to appeal this finding. See Ra4, identifying CRDA's assignments of error. And, in any event, the court's legal and factual findings are well supported both by longstanding precedent and the record in this case. The easiest way to resolve this appeal is simply to affirm the opinion below.

If this Court does not affirm on these grounds, however,

this case presents the opportunity to address additional fundamental constitutional questions about the scope of the eminent domain power. The Birnbaums have raised (and cross-appealed) four independent constitutional objections to the condemnation, each of which is a sufficient ground for affirming the decision below. First, the taking must be rejected because CRDA has failed to articulate a sufficiently specific use for the property (whether it will be used as a public park or whether it will be transferred to a private developer) to allow a court to even evaluate the condemnation's constitutionality. Second, CRDA is unconstitutionally seeking to condemn private property for private redevelopment use without complying with the requirements of the New Jersey Constitution's Blighted Areas Clause. Third, CRDA has failed to establish that the Birnbaums' property – an awkward "thumb" grafted onto the square block of properties CRDA is currently acquiring – is necessary for the completion of the Project. And fourth, CRDA has failed to establish that there is a constitutionally sufficient public purpose undergirding the taking under either the New Jersey or the U.S. Constitutions.

In short, on this record, the trial court correctly rejected this taking, either because it was correct about the (very simple) holding it actually made or because the Birnbaums are correct about at least one of their four broader constitutional arguments. In either case, the ruling below must be affirmed.

I. **The final ruling below was correct.** (Pa1072; Pa843-44)

The decision below finds that CRDA has abused its discretion

here based on two findings. First, the court below held as a legal matter that "our Legislature did not intend, and the Constitution does not permit, property to be acquired and to remain idle indefinitely, without a reasonable assurance that the proposed plan to justify the taking will be implemented." Pa1072; Pa843-44. Second, the court below found as a factual matter that it was not reasonable to believe that CRDA would actually be able to put the Birnbaums' property to a public use. Pa1068, Pa1078. Each of these basic findings is correct — and, indeed, neither of them is even seriously challenged in CRDA's appeal.

A. New Jersey law does not allow condemnations where there is no reasonable likelihood the condemned property will be put to a public use.

The court below rejected the condemnation here because it held that a condemnor abuses its discretion by condemning property without any reasonable likelihood that the property will be put to the asserted public use. Pa1072; Pa843-44.

CRDA's brief refuses to engage with this holding. Instead, it proceeds from the premise that the court's opinion below was based on Casino Reinvestment Development Authority v. Banin, 320 N.J. Super. 342 (L. Div. 1998), which held that a condemnor is required to provide "adequate assurances of future public use," a doctrine CRDA asserts is inapplicable here. See Pb20-22.

But, correct or not, Banin was simply not the basis of the decision CRDA is appealing. As discussed in more detail infra, Banin is a case that holds that, if a condemnor plans to transfer

property to a private owner, the condemnor must provide "adequate assurances" that the new private owner will put the property to the public use that justifies the condemnation. See infra Part V.A. Neither Banin nor its holding was the basis of the decision CRDA appeals: The opinion below does not cite Banin, and it does not use the phrase "adequate assurances." To be sure, the Birnbaums did invoke Banin below, but the court expressly **rejected** that argument.[5] See Pa797-98, rejecting Banin argument; Pa844, reaffirming legal holdings.

Instead of relying on Banin, the opinion below relies on a much simpler legal premise that goes unaddressed by CRDA's brief: that the constitutional requirement that condemnations be for a "public use" necessarily means that there is some reasonable likelihood that an asserted public use will actually occur. If there is no likelihood that an asserted public use will occur, then the condemning authority has abused its discretion.

CRDA does not address this idea, much less provide a citation to a case rejecting (or, indeed, discussing) this idea.[6] And indeed it cannot: The holding below is plainly correct. New Jersey courts have consistently treated a condemnor's factual ability (or inability) to achieve its asserted public use as an

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[5] The Birnbaums have cross-appealed on this point. See infra Part V.A.

[6] Indeed, CRDA flatly concedes that a taking can be rejected if it is an "abuse of discretion." Pb32. It simply fails to explain why the absence of any reasonable prospect of achieving a stated public use does not, as the court below held, constitute an abuse of discretion.

element of the public-use inquiry for at least thirty years. See Comm'r of Transp. v. Malibu Beach, Inc., 209 N.J. Super. 291, 298 (L. Div. 1985) (allowing condemnation because "Defendants . . . have failed to offer any evidence that plaintiff cannot reasonably expect to achieve the public purpose for which it seeks to condemn the property herein").

And this rule makes perfect sense. As a simple matter of logic, a condemnor's practical ability to achieve a public use is relevant to the question of whether property is being condemned for the purpose of that use. Surely if CRDA asserted that it planned to condemn the Birnbaums' longtime family home in order to put it to public use as a diamond mine, a court would be allowed to consider that there is no reason to believe that there are diamonds to be found on the Birnbaums' land, and to reject a taking based on such an unsupportable premise. If the court below found — as it did — that there is no reason to believe that CRDA can implement the Project it puts forward as a public use in this case, then surely the same result must follow.

Moreover, the basic idea that a condemnor abuses its discretion by taking property with no reasonable likelihood of achieving its stated purpose is not just the law in New Jersey; it is the law in states across the country (and has been, uncontroversially, for decades). See, e.g., Phoenix v. McCullough, 536 P.2d 230, 236 (Az. Ct. App. 1975) (rejecting taking as arbitrary where there was no reasonably expected use within 15 years); Meyer v. N. Indiana Pub. Serv. Co., 258 N.E.2d

57, 58-59 (Ind. 1970) (taking of right of way for "sometime in the future, maybe as much as six or ten years," considered a "purely speculative future need"), superseded on unrelated grounds, 287 N.E.2d 882 (Ind. 1972); Mann v. Marshalltown, 265 N.W.2d 307, 315 (Iowa 1978) ("Upon trial it shall be plaintiffs' burden to prove by a preponderance of the evidence that defendant cannot reasonably expect to achieve its public purpose. If the trial court determines plaintiffs have sustained this burden, the court shall issue an injunction restraining defendant from condemning their property."); Concerned Citizens, United, Inc. v. Kansas Power & Light Co., 523 P.2d 755, 769 (Kan. 1974) ("To be free of such abuse [of discretion], the decision of KPL must be based upon a reasonable probability that the construction and operation of this energy center will comply with all applicable standards and meet the requirements for the issuance of all necessary permits, state and federal."); N. Ky. Port Auth., Inc. v. Cornett, 625 S.W.2d 104, 104-05 (Ky. 1981) (allowing condemnor to take land even though it had not yet secured permission to build the proposed use because it had "every reason to believe that the permission will be granted"); Regents of Univ. of Minn. v. Chic. & N.W. Transp. Co., 552 N.W.2d 578, 580 (Minn. Ct. App. 1996) (rejecting taking in part on grounds that "because of soil contamination problems, it is undisputed that the University could not currently use the property for any of its proposed uses"); Falkner v. N. States Power Co., 248 N.W.2d 885, 891-93 (Wis. 1977) ("It is only if Northern States Power Company cannot

reasonably expect to achieve its public purpose that its right to take land by condemnation should be denied.").

While many different states have articulated the same basic principle applied by New Jersey's courts, the single most factually analogous case the Birnbaums can identify is the Kentucky condemnation described in BIF, Inc. v. Cnty. of Campbell, 2007 Ky. App. Unpub. LEXIS 858, NO. 2007-CA-000047-MR (Ky. Ct. App. Dec. 14, 2007) (subsequent proceeding on attorney's fees after rejection of condemnation).[7] In that case, like this case, the condemnor had premised its initial decision to condemn on its ability to rely on a particular funding source (there, federal funding; here, revenue from the Revel). Id., quoting initial panel opinion. In that case, like this case, the condemnor had no reasonable prospect of obtaining the originally-hoped-for funds. Id. And in that case, like this case, a trial court found there was no reasonable assurance that the intended use would come to pass in light of the condemnor's inability to rely on its originally intended funding source. Id. The Birnbaums respectfully suggest that this case, like that case, should be summarily affirmed on appeal.

In sum, the ruling under review was premised on a simple legal proposition – that the requirement that a condemnation be for "public use" means there must be a reasonable expectation that a condemnor's asserted public use will actually come to

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[7] This unpublished decision is also reproduced in Defendant/Respondents' Appendix at Ra14.

fruition – that has long been the law in New Jersey and elsewhere. CRDA has failed to even address this holding, much less provide this Court with a reason to depart from longstanding New Jersey (and nationwide) practice by rejecting this holding. The decision below should therefore be affirmed.

B. CRDA provides no reason to set aside the trial court's factual findings.

After an evidentiary hearing, the court below found as a matter of fact that there was no reasonable basis to believe that CRDA would be able to use the Birnbaums' property in furtherance of the Project if it were allowed to condemn it. Pa1068, Pa1078. CRDA provides no reason to set aside this finding.

As an initial – and dispositive – matter, CRDA has not even appealed this factual finding. (See Ra4a (identifying CRDA's assignments of error).) Nothing in CRDA's notice of appeal in this matter suggests that the court below erred in finding that there was no reasonable basis to expect a public use in this case, and so this Court need not reevaluate the factual findings below. See, e.g., Iuppo v. Burke, 162 N.J. Super. 538, 552 (App. Div. 1978) ("[An issue] not identified in the notice of appeal . . . is not properly before us.").

And, CRDA's procedural default to one side, the judge's factual finding is more than amply supported by the record, which shows that:

- The Project was originally intended to "complement" the new Revel Casino and Resort – a business that no longer existed to be complemented;

- The Project was originally conceived as relying on funds derived from the Revel itself – funds that, with the Revel's demise, were no longer available;
- Even apart from the Revel's closing, CRDA faced political and economic changes that had substantially reduced its budget going forward;
- CRDA had repeatedly in the past (including in the immediate vicinity of the Project) needed to provide millions of dollars in financial incentives in order to create development, but similar funds were now unavailable for the Project;
- While CRDA officials repeated testified that the Project was fully funded, they uniformly clarified this testimony on cross examination to make clear that they only meant that CRDA had enough money to acquire and demolish the Birnbaums' longtime family home, not that CRDA had any funds set aside to ensure that anything would be built on the site;
- The future of Atlantic City itself was in flux, with a real (subsequently realized) possibility that the city's governance would be taken over by the state and no way to be sure whether the Project would still fit with whatever new vision for Atlantic City's future ultimately prevailed.

See supra at 8-14. Given all these facts, the court below was more than justified in finding that there was no reasonable

possibility that CRDA would actually put the Birnbaums' property to a public use if allowed to condemn it.

More broadly, to the extent CRDA's brief addresses (even obliquely) its ability to actually implement the Project, its arguments are unavailing. CRDA advances, at most, three arguments: (1) it rehashes the argument rejected below that it is "fully funded" to complete the Project, (2) it suggests that it can achieve a "public use" for the Birnbaums' property simply by dint of the property's location in the Tourism District, and (3) it contends that a condemnation cannot be rejected based on a lack of "plan specificity." Each of these arguments fails as a basis for rejecting the factual finding below.

First, as expressly addressed in the opinion below, CRDA is "fully funded" only to complete one part of the Project: the part that involves acquiring and demolishing the Birnbaums' property. It has no committed funding for anything else, despite the fact that (1) CRDA has expressly conceded that development – not just in general, but specifically in the vicinity of the Birnbaums' property – frequently requires CRDA to provide financial incentives to a developer and (2) CRDA's initial plans for the Project relied on a revenue stream from the Revel Casino – and those plans were never reevaluated after that revenue stream vanished. In short, no one – not the Birnbaums, and not the court below – questions whether CRDA has the funding necessary to knock down the Birnbaums' house. The only question is whether CRDA can reasonably be expected to replace it with a public use.

And, on this record, the court below found that it cannot.

Second, CRDA's assertion that the Birnbaums' property will be put to a public use simply by dint of the property's location in the Tourism District can be rejected out of hand. See Pb22, "As long as [the Birnbaums' property] remains part of the Tourism District, it is being put to the public use that was declared . . . through the Tourism District Act.". The lower court's decision was predicated on a concern that the Birnbaums property would sit vacant and neglected for years if CRDA was allowed to condemn it based on its 2012 resolution authorizing the Project. CRDA's rejoinder to that concern, apparently, is that creating a vacant lot for many years to come is a perfectly valid public use, so long as that vacant lot is inside the boundaries of the Tourism District. This is not a serious argument: CRDA did not premise its condemnation of the Birnbaums' property on the idea that condemnation would allow the Birnbaums' property to be part of the Tourism District. The Birnbaums' property is **already** part of the Tourism District, and so its current use (as a residence and as Charles Birnbaum's piano studio) is already a Tourism District use.[8] Instead, CRDA premised its condemnation on the Project outlined in 2012 — a Project that the court below found, as a matter of fact, had no reasonable prospect of coming to fruition in its current form. Because the court found that CRDA's stated

[8] CRDA does not contend — and there is no basis in the record, the Tourism District Act, or CRDA's Tourism District Master Plan to believe — that residential or piano-studio uses are not "Tourism District use[s]." See Pb22.

public purpose for the condemnation (the Project) had no reasonable likelihood of coming to pass, it correctly rejected the taking.

Finally, CRDA's suggestion that the opinion below rejects the instant condemnation because of a lack of "plan specificity" is simply wrong. Pb30-33. To be sure, the Birnbaums contend (and have cross-appealed on the question of whether) CRDA's plans for the Project provide insufficient detail to support a condemnation. See infra Part V.A. But the court below rejected these arguments (which is why the Birnbaums cross-appealed). See Pa797-98. The court below only considered the vagueness of CRDA's plans in the broader factual context of this case, in which it had ceased to be a plan at all because the business it was intended to complement had vanished, the revenue it intended to spend had vanished, and the entire governing structure of the city in which it was located was at risk of vanishing. The court did not conclude that the Project itself was unconstitutionally vague; it simply concluded that, in the current context, CRDA could not be reasonably expected to implement the Project as articulated in 2012. CRDA provides no argument for why a plan's vagueness cannot be considered as an element in the factual inquiry into whether an asserted public use is reasonably likely to come to fruition, and it similarly provides no argument to suggest that the court below would have reached a different conclusion had it disregarded "plan specificity" in reaching its (unchallenged) factual conclusion.

In sum, the opinion below is both simple and unremarkable. It holds, in keeping with longstanding New Jersey law and with the law of states across the country, that a condemnor cannot condemn based on a public use that cannot reasonably be expected to come to pass. And it finds, after careful consideration of a full record, that CRDA's 2012 idea of the Project cannot reasonably be expected to come to pass. CRDA does not refute – or, really, contest – either of these basic holdings, and this Court should therefore affirm the ruling below.

II. The court erred in finding that CRDA had articulated a sufficiently specific public use to justify the taking of the Birnbaums' property under the New Jersey and United States Constitutions. (Pa785-89)

Private property may only be taken for a "public use" under both the United States and New Jersey Constitutions. U.S. Const. amend V; N.J. Const. art. I, ¶ 20; see, e.g., Gallenthin Realty Dev., Inc. v. City of Paulsboro, 191 N.J. 344, 356 (2007). A court cannot satisfy its obligation to meaningfully evaluate whether a property subject to eminent domain is being taken for a "public use" until it knows the intended use. The Court below erred in finding in its November 17, 2014 opinion that CRDA "provide[d] a valid, sufficient, and specific public purpose to justify the taking of the Birnbaum property." Pa785. This was in error because the undisputed record demonstrates that CRDA failed to articulate **any** particular use, much less a public use, for the Birnbaums' property. This is a taking of the "condemn now, figure it out later" variety, and is thus constitutionally impermissible

The lower court incorrectly held that CRDA had articulated "a sufficient level of specificity for the public use of the Birnbaum property," (Pa788), even though CRDA could not identify anything specific about its plans for the Birnbaums' house. As CRDA still admits, "[i]t is **impossible** . . . for CRDA to dictate exactly which hotel, restaurant or public amusement will occupy a specific parcel of land." Pb33, emphasis added. But the problem lies far deeper than not being able to match a specific hotel or restaurant with a specific condemned property: CRDA did not even present a general development plan (or redevelopment plan) for the project area encompassing the Birnbaums' home. See Pa501-02; Pa504; Pa507-509; Pa521-23; Pa527-29; Pa559-561; see also Pa567, describing the preparation of an "architectural massing plan" for Phase I of the South Inlet Project that, "will be released" once it is "finalized and approved by CRDA's Board".[9]

The most CRDA can say is that it plans to place the property in what CRDA describes as a "land bank," See, e.g., Pa377-78 at ¶¶ 43-44, Pa424-27; see also Pa209-10 at ¶¶ 2-3, Pa235, Pa430 at ¶ 9, Pa451, Pa788; Pb25-26 & n.4, for an indeterminate future "Tourism District use."[10] Pb22-23. But bulldozing longtime

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[9] The massing plan was not presented to the lower court or the Birnbaums before the court issued its November 17, 2014 opinion. As discussed supra, the massing plan was uncovered in subsequent proceedings and revealed that the entirety of CRDA's plan for the Birnbaums' property was "FUTURE DEVELOPMENT." (See supra at 11.)

[10] Again, at no point has CRDA defined the term "Tourism District use." It appears to encompass nearly any kind of use, including basically any imaginable commercial or residential use. (See Pb22-23, naming six totally different potential uses plus "any

family homes to create vacant land for unspecified development at an unknown future time is simply not a "use," let alone a public use. On this record, a court commits clear error when it finds that a condemnor has articulated a sufficiently specific public use to justify the taking under the Public Use Clauses of both the New Jersey and United States Constitutions.

The vagueness of CRDA's plans is underscored by the major shift in CRDA's description of the purpose for this condemnation. The original stated purpose for the South Inlet Project was to create development that would "complement the new Revel Casino and assist with the demands created by the resort." Pa228, Pa899; see also Pa1026, 30:5-30:10. After the Revel Casino filed for its second bankruptcy in two years, however, CRDA quietly abandoned any references to the Revel, instead attempting to justify the specific Project simply by reference to the vague standards of the Tourism District Act itself: to support the state's ailing gaming and tourism industries to create more jobs and revenue. See Pa776, November 17 opinion, relying entirely on the purposes of the Tourism District Act rather than the purpose of the Project. In other words, this taking is for whatever CRDA wants it to be for at any given time. Given the important property rights at stake, the court below should not have permitted CRDA to offer such a vague, moving-target rationale in lieu of articulating an actual public-use justification for

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other District use." The Birnbaums have been unable to identify any use that would **not** be a "Tourism District use," and CRDA has never identified one during the pendency of this litigation.

taking the Birnbaums' longtime family home.

Because courts require a specific public use to be articulated, the court below should have rejected this condemnation in the absence of any specific explanation from CRDA about what it planned to do with the property beyond "land banking" for a future "Tourism District use." Below, Section A explains how the lower court erred in finding that the Tourism District Master Plan and the resolutions relating to Project contained a sufficient level of specificity to satisfy the public-use requirement for taking the Birnbaums' property. Then, Section B discusses how the lower court erred by finding that "land banking" was a sufficiently specific use that satisfies the public-use requirement for taking the Birnbaums' house.

A. The court erred in finding that the Tourism District Master Plan and the South Inlet Mixed Use Development Project contain a sufficient level of specificity to satisfy the public-use requirement for taking the Birnbaums' property.

In its November 17, 2014 opinion, the court below found that: "The Tourism District Master Plan and the South Inlet Mixed Use Development Project contain a sufficient level of specificity to justify the taking of the Birnbaum property by eminent domain." Pa785. The court repeats variations of this conclusion for several pages without ever identifying any specific plans for the Birnbaums' property nor anything more specific about the Master Plan or the South Inlet Project than a recitation of their purposes, such as this elevator pitch: "it would include mixed use developmental, retail, restaurants, boutiques, and potential

use for a higher education site within the project area." Pa787. To be clear, the lower court was not summarizing a detailed development plan, it was paraphrasing CRDA's resolution implementing the South Inlet Project, which describes the project as "a mixed use residential and retail development including restaurants, specialty stores, boutiques and residential housing for rent and purchase that tie into the open space greenway of the Lighthouse District Park Project, and potential uses for a higher educational site within the Inlet." Pa225, Pa896. That description is the greatest level of detail offered by CRDA for what would be done in the project area.

As the lower court acknowledged, CRDA offered no details about what it intended to do with the Birnbaums' house. Pa786. Now, as then, CRDA maintains that it could put the Birnbuam's property to any of countless "Tourism District use[s]." Pb22: "It does not matter if it is put to hotel use, restaurant use, parking lot use, amusement use, park use, pavilion use or any other [Tourism] District use." Tellingly, the most specific information identified by the court regarding CRDA's plans for the Birnbaums' property was the following sentence: "It all starts with the property being located within the statutorily created Tourism District and within the South Inlet Mixed Use Development Project area." Pa787. The lower court goes no further then this first step of identifying the location of the property.

But the Birnbaums' property's location inside the Tourism

District must be the beginning, not the end, of the analysis. The constitutional analysis of a taking is different if the government plans to keep the land and build a road on it than it would be if the government planned to give the land over to a private owner to build a private use. And that analysis cannot take place if a condemnor refuses to say what it will do with the land outside of the bare fact that the land is, and will definitionally continue to be, inside a particular zoning district.

New Jersey, like other states, does not allow condemnations to proceed on a condemnor's mere say-so. Courts — in New Jersey and nationwide — routinely require condemnors to articulate a specific purpose for the property they propose to take. See, e.g., Burnett v. Abbott, 14 N.J. 291, 295 (1954) (noting that courts strike down takings where they are clearly "in excess of the public use upon which it is bottomed **in a particular instance**" (emphasis added)); N.J. Highway Auth. v. Currie, 35 N.J. Super. 525, 531-33 (App. Div. 1955) (noting that takings are "limited to lands reasonably necessary for the achievement of the statutory purpose," which in that case included "recreational facilities, maintenance and storage areas" for construction of the Garden State Parkway).[11]

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[11] See also Utah Dep't of Transp. v. Carlson, 332 P.3d 900, 907 (Utah 2014) (remanding due to the "lack of any clearly articulated 'public use'" and noting that "UDOT appears not to have clearly articulated its anticipated plans or purposes for the excess property at issue. Such an articulation could be crucial to an evaluation of the viability of UDOT's taking under

Currie demonstrates the importance of enumerating the specific public use(s) for which a taking is intended so that courts may meaningfully evaluate whether the taking is for a "public use." The Currie court recognized that takings may be challenged for abuse of discretion, but explained that such challenges will fail "[i]f the land is to be devoted to a **legitimate public use**." Id. at 533, emphasis added. As the Court noted in Currie, "we must determine whether the taking of the entire fee for all the enumerated purposes was a manifest abuse of discretion." Id.; see also Burnett, 14 N.J. at 295 (explaining that courts examine the "particular instance" to determine whether a taking exceeds the public use proffered by the government). Crucially, in Currie, the Highway Authority had asserted several specific public uses relating to construction of the Garden State Parkway intended for the property at issue, including "protection of the causeway, maintenance, storage and

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the public-use standard . . . ."); City of Stockton v. Marina Towers L.L.C., 88 Cal. Rptr. 3d 909, 913, 921 (Cal. Ct. App. 2009) (rejecting City's stated purpose for the taking – "acquisition of additional land in conjunction with potential development" – as "so vague, uncertain and sweeping in scope that it failed to specify the 'public use'," and noting that "[t]his crucial defect precluded an intelligent inquiry into whether City had a legal right to condemn the property"); Ga. Dep't of Transp. v. Jasper Cnty., 586 S.E.2d 853, 857 (S.C. 2003) ("The involuntary taking of an individual's property by the government is not justified unless the property is taken for public use – a fixed, definite, and enforceable right of use . . . ."); Regents of Univ. of Minn. v. Ch. & N.W. Transp. Co., 552 N.W.2d 578, 580 (Minn. Ct. App. 1996) (rejecting condemnation on "necessity" grounds because the University had not identified any specific purpose for the condemnation, which was supported only by "speculative purposes").

recreational facilities," and a "spoil area" for dredging of the causeway. Id. at 530, 533. Not so here. Rather than identify any actual public use for the Birnbaums' property, CRDA merely proclaims that the property "is already part of the Tourism District and will thus always be subject to Tourism District use." Pb22.

Regents is also particularly instructive because the facts are remarkably similar to the facts of this case. The condemnor in Regents had a "master plan for its anticipated development of the Twin Cities campus." 552 N.W.2d at 580. The problem was that – **exactly** as is the case here – the "master plan" did not identify any particular use for the property being condemned. Id. Similar to the smorgasbord of potential "Tourism District use[s]" presented in this case, (Pb22-23; see also Pa225, Pa896 (identifying "mixed use residential and retail development including restaurants, specialty stores, boutiques and residential housing for rent and purchase" plus a "higher educational site")), the condemnor in Regents had identified three separate potential uses; the problem was that (as here) the uses were mutually exclusive, and the condemnor had not identified which one of them it actually wanted the property for. 552 N.W.2d at 580. CRDA is therefore doing exactly what the Minnesota court rejected in Regents: It is acquiring property "for speculative future use (stockpiling) by condemnation." Id. This Court should reject this taking for exactly the same reason.

B. The court erred in finding that land banking for future, unspecified development was sufficiently specific to satisfy the public-use requirement for taking the Birnbaums' property.

In its November 17, 2014 opinion, the court below also stated that it was "not persuaded by the Birnbaums' argument that the CRDA may not land bank for an unspecified future use" because it found that "the Legislature anticipated that at times property acquired by the CRDA would not be put to immediate use." Pa788. However, the court's opinion only examined whether the CRDA had **statutory** authority to land bank — an issue not contested by the Birnbaums — and failed to address the Birnbaums' **constitutional** argument that "land banking" is not a sufficiently specific public use to justify the taking of the Birnbaums' property. As the court explained, "the Court is satisfied that the CRDA is acting within the statutory framework and objectives of the New Jersey legislature." Pa788. But the statutory framework and objectives of the New Jersey legislature do not override constitutional protections.

But banking land for indefinite periods of time is not a "use," much less a public use. It is a deliberate **non-use** of land while waiting for potential development projects to materialize. CRDA has relied heavily throughout this case on the fact that its statutory authorization for eminent domain allows it to acquire property "whether for immediate use." See, e.g., Pa848, citing N.J.S.A. 5:12-182. But surely there is a difference between not using property **immediately** and not using property **at any point in the foreseeable future**. With no massing

plan presented to the court (much less finalized) and no developer identified ,(Pa567), there was no "use," immediate or otherwise, to which CRDA planned to put the Birnbaums' property. Instead, this taking was merely for the purpose of land assembly. See id., "CRDA is acquiring the Property in order to assemble a development-ready parcel of land."

Condemning authorities cannot evade the requirement that they articulate specific public uses for property they seek to take by offering generic descriptions of non-uses such as "land banking" or "land assemblage" that merely serve as placeholders for unnamed future uses. Courts in New Jersey, and elsewhere, must determine "[i]f the land is to be devoted to a legitimate public use." Currie, 35 N.J. Super. at 533. In order to do so, courts must know the specific intended purpose of the "land banking" or "land assemblage," and reject takings that fail to articulate such a purpose. See, e.g., City of Stockton v. Marina Towers L.L.C., 88 Cal. Rptr. 3d 909, 913, 915 (Cal. Ct. App. 2009) (rejecting proposed land-assemblage condemnation as a case of "condemn first, decide what to do with the property later"); Regents, 552 N.W.2d at 580 (rejecting condemnation "for speculative future use (stockpiling) by condemnation"); Krauter v. Lower Big Blue Nat. Res. Dist., 259 N.W.2d 472, 475-76 (Neb. 1977) (holding that "a condemning agency must have a present plan and a present public purpose for the use of the property before it is authorized to commence a condemnation action . . . . [T]he possibility that the condemning agency at some future time may

adopt a plan to use the property for a public purpose is not enough to justify a present condemnation."); State ex rel. Sun Oil Co. v. City of Euclid, 130 N.E.2d 336 (Ohio 1955) (holding that land may not be appropriated for a contemplated but undetermined future use).

Regents is again instructive because the express purpose of the taking was so similar. In Regents, the court rejected a public university's attempt to "acquire [land] for speculative future use (stockpiling) by condemnation," because the university had identified multiple conflicting "potential uses" for the land but had not actually approved any development projects for the property. 552 N.W.2d at 580. The proposed taking here fares no better: CRDA identifies no use for taking and "land banking" the property beyond the catch-all "Tourism District use" and a grab bag of potential "mixed use" uses. See Pb22-23; Pa225, Pa896. CRDA certainly has not approved any development projects for the property. See Pb32-33, arguing that no such plans are necessary and stating that it would be "impossible" for CRDA to identify the use to which the property will be put.

This condemnation was therefore premised on exactly the kind of plan that has been squarely rejected by courts in other states: "condemn first, decide what to do with the property later." City of Stockton, 88 Cal. Rptr. 3d at 913 (rejecting "acquisition of additional land [in] conjunction with potential development" as too vague to count as an articulated public use). Because CRDA has no concrete plans for the condemnation, and

failed to articulate any specific use, the lower court could not have meaningfully evaluated whether the taking was for a "public use." The court below was in error, and its order denying the condemnation can therefore be affirmed on this alternate ground.

III. The court erred in finding that taking the Birnbaums' property was permitted under the Blighted Areas Clause of the New Jersey Constitution. (Pa792-96)

In its November 17, 2014 opinion, the court below found that, "the CRDA is not taking the Birnbaum property for the purpose of redevelopment which triggers the Blighted Areas Clause of the New Jersey Constitution." Pa795. As part of its ruling on the Blighted Areas Clause, the court below reached three holdings, one in the alternative: (1) "The taking of the Birnbaum property is not for blight remediation or for purposes of economic redevelopment"; (2) "The CRDA is not required to make a finding that the Birnbaum property is blighted because this is not a taking for redevelopment triggering the Blighted Areas Clause of the New Jersey Constitution"; and (3) "Even if this were a taking for redevelopment, subject to the Blighted Areas Clause of the New Jersey Constitution, the Court is satisfied the legislative enactments and declarations satisfy the constitutional requirement." Pa792.

The court below was correct that this taking was not for blight remediation.[12] However, the lower court erred in holding

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[12] CRDA has never made any allegation, nor provided any evidence, that the Birnbaums' property is "dilapidated" or "deteriorated" or is having a "decadent effect" on surrounding properties as required by Gallenthin. See 191 N.J. at 362-63; id. at 365.

that: (A) the taking was not a redevelopment taking that required authorization under the Blighted Areas Clause, or that, (B) in the alternative, a hodgepodge of four different bills passed over a 40-year period, only one of which mentions "blight" in Atlantic City, actually constitutes a factual "finding of blight" that would be legally sufficient to uphold a taking under the Blighted Area Clause. Each error is addressed in turn below.

A. The court erred in finding that this was not an economic-redevelopment taking for which a finding of blight is required under the Blighted Areas Clause.

In its November 17, 2014 opinion, the court below found that, "CRDA is not required to make a finding that the Birnbaum property is blighted because this is not a taking for redevelopment triggering the Blighted Areas Clause of the New Jersey Constitution." (Pa792.)

The court reasoned that, "the taking in this case is not for the redevelopment of a blighted area. The Atlantic City Tourism District, as the name suggests, is about promoting tourism and promoting the ailing gaming industry." (Pa794.) The lower court is correct that there is no blight at issue in this case, but that is precisely the problem, because: (1) economic-development takings are not permitted in New Jersey without a finding of blight, and (2) the taking in this case is necessarily an economic-development taking.

1. Economic-development takings require a finding of blight in New Jersey.

As the New Jersey Supreme Court explained in a detailed 2007 opinion, the New Jersey Constitution does not allow eminent

domain to be used for economic redevelopment (as distinct from blight removal). Gallenthin Realty Dev., Inc. v. Borough of Paulsboro, 191 N.J. 344, 373 (2007). That is, the New Jersey Constitution does not allow the government to exercise eminent domain against a property that is "not fully productive" or "because the property is not used in an optimal manner" in an effort to replace the current sub-optimal private use with a more optimal private use. Id. at 348, 373.

Instead, "the New Jersey Constitution authorizes government redevelopment of only 'blighted areas.'" Id. at 348. As the Gallenthin court explained, the original New Jersey Constitution did not authorize condemnation for general "redevelopment" – for taking property in order to turn it from one private use to another private use, even if that private use would generate more public benefits in the form of economic activity, tax revenue, etc. Id. at 360-62, 365; see also Hon. James R. Zazzali and Jonathan L. Marshfield, Providing Meaningful Judicial Review Of Municipal Redevelopment Designations: Redevelopment In New Jersey Before And After Gallenthin Realty Development, Inc. v. Borough Of Paulsboro, 40 Rutgers L. J. 451, 468-75 (2009) ("Zazzali L. J. Art."). That power was only added to the New Jersey Constitution with the addition of the Blighted Areas Clause, which for the first time gave New Jersey's government the power to use eminent domain to correct "the deterioration of 'certain sections' of 'older cities' that were causing an economic domino effect devastating surrounding properties." Gallenthin, 191 N.J. at

61-62. But this new power was strictly limited by the Blighted Areas Clause itself. Gallenthin, 191 N.J. at 373; see also Zazzali L. J. Art. at 490-97.

This limitation is, as Gallenthin squarely held, constitutional in nature. It is not, as the court below erroneously held, a mere statutory constraint created by the Local Redevelopment and Housing Law ("LRHL"). See Pa794 (finding that the LRHL "does not apply to CRDA, it only applies to municipalities," and suggesting that this therefore exempts CRDA from the requirements of the Blighted Areas Clause).

The court below simply misread Gallenthin as only addressing the statutory limitations under the LRHL. Pa793-94 (describing Gallenthin as invalidating a designation of property "'as in need of redevelopment' based on the improper application of the LRHL"). To be sure, Gallenthin was a case about the LRHL, but it was about the **constitutionality** of a portion of the LRHL **in light of** the Blighted Areas Clause's constitutional limits on using eminent domain for "redevelopment" takings. 62-64 Main Street, LLC v. Mayor and Council of City of Hackensack, 221 N.J. 129, 136 (2015) (confirming that "Gallenthin . . . addressed a specific constitutional defect in subsection e of [the LRHL]"); accord Gallenthin, 191 N.J. at 359 ("The [Blighted Areas Clause] operates as both a grant and **limit on the State's redevelopment authority**." (emphasis added)).

Specifically, the Gallenthin court found that the Borough of Paulsboro's interpretation of the LRHL's broadly written

subsection (e) – which permitted takings for "growing lack or total lack of proper utilization of areas" caused by a variety of different conditions – stretched the meaning of "blight" too far, and would have allowed seizures of any properties that were not put to their "optimal" use, contrary to the very intent of the Blighted Areas Clause. 191 N.J. at 363-65. But rather than immediately invalidate the law, the Gallenthin court used the doctrine of constitutional avoidance to construe subsection (e) of the LRHL in a manner consistent with the Blighted Areas Clause. 191 N.J. at 365 ("We now address whether [subsection (e) of the LRHL] is 'reasonably susceptible' to an alternative interpretation that conforms to the Blighted Areas Clause."). The Gallenthin court found that the LRHL could be reconciled with the Blighted Areas Clause if (and only if) subsection (e) was limited "to apply only to property that has become stagnant because of issues of title, diversity of ownership, or other similar conditions" which met with historical definitions of blight and was consistent with the limitations of the Blighted Areas Clause. Id. at 370.

In short, Gallenthin was expressly a case about constitutional limits on the power of eminent domain itself. The lower court erred by construing it as a case only about the statutory scope of the LRHL.

This legal error led directly to the lower court's erroneous 2014 decision: Gallenthin clearly holds that the Blighted Areas Clause **only** allows property to be condemned for redevelopment of

"blighted areas," and it does not permit the condemnation of property in order to devote it to a different use simply because the current use is "not fully productive" or merely being used "in a less than optimal manner." Id. at 348, 365; see also Zazzali L. J. Art. at 457 & n.30 (observing that "the constitution limits redevelopment to only 'blighted' areas'" and further noting that "municipalities must first demonstrate that an area is 'blighted' before they can engage in redevelopment."); accord Harrison Redev. Agency v. DeRose, 398 N.J. Super. 361 (App. Div.), certif. denied sub nom. Harrison Redev. Agency v. Harrison Eagle L.L.P., 196 N.J. 87 (2008) (reinforcing Gallenthin's holding that blight must be found to in order to exercise powers based on the Blighted Areas Clause). In other words, the New Jersey Constitution allows condemnations to remove harmful uses, but it does not allow condemnations that seek only to replace current uses with better ones.

New Jersey courts are hardly alone in rejecting takings designed to make a given property more fully productive or to be used in a more optimal manner (absent actual findings of blight). In 2004, for example, the Michigan Supreme Court rejected economic-development takings in County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004) (overturning Poletown Neighborhood Council v. Detroit, 304 N.W.2d 455(Mich. 1981)); see also, e.g., Sweetwater Valley Civic Ass'n v. City of Nat'l City, 555 P.2d 1099, 1103 (Cal. 1976) (rejecting taking because "it is not sufficient to merely show that the area is not being put to its

optimum use, or that the land is more valuable for other uses"); accord Gallenthin, 191 N.J. at 364 (citing Sweetwater Valley). And the only three state supreme courts that have considered the use of eminent domain for pure economic development since 2006 have squarely rejected it. See City of Norwood v. Horney, 853 N.E.2d 1115 (Ohio 2006); Bd. of Cnty. Comm'rs v. Lowery, 136 P.3d 639 (Okla. 2006); Benson v. State, 710 N.W.2d 131 (S.D. 2006). This is in keeping with a long line of cases in which the high courts of other states have found that the power of eminent domain cannot be exercised simply in the pursuit of alleged economic benefits or assertedly superior uses. See, e.g., Ga. Dep't of Transp., 586 S.E.2d at 856 (rejecting the proposition that "economic benefit is a sufficient public use" and noting that "[i]t is well-settled that the power of eminent domain cannot be used to accomplish a project simply because it will benefit the public."); Sw. Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C., 768 N.E.2d 1, 9 (Ill. 2002) (adhering to "the long-standing rule that 'to constitute a public use, something more than a mere benefit to the public must flow from the contemplated improvement'" (citation omitted)).[13]

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[13] New York's Court of Appeals, alone among American high courts, has taken a sweeping view of the government's ability to condemn for blight removal. See Kaur v. N.Y. State Urban Dev. Corp., 933 N.E.2d 721, 730-31 (N.Y. 2010) (describing the extremely limited role of New York courts in reviewing blight findings). This position is at odds with both the out-of-state cases cited in the main text and, most importantly, with Gallenthin itself. See, e.g., Gallenthin, 191 N.J. at 373 (describing the "substantial evidence" standard used by New Jersey courts when evaluating blight findings).

Thus, under the Blighted Areas Clause of the New Jersey Constitution – as well as similar provisions of many other state constitutions – takings for the purpose of economic redevelopment are not allowed, absent a finding of blight.

2. The lower court erred by failing to recognize that the taking in this case is an economic-development taking.

The court below also erred by failing to recognize that the taking in this case is a taking for economic redevelopment. The lower court found that, "[t]he Tourism District Act has nothing directly to do with a plan to redevelop a stagnant and depressed area that is devastating an older city." Pa794. Instead, the court claimed, "the taking is in response to the statutory mandates of the Tourism District Act to develop a tourism district." Pa795. This was incorrect: a "**taking . . . to develop** a tourism district" by the Casino Reinvestment **Development** Authority as part of the South Inlet Mixed Use **Development Project** is a taking for a redevelopment project. Id., emphasis added.

To be sure, the court below was correct that the Tourism District Act itself is not a plan to redevelop a stagnant and depressed area. But, as discussed above, the Tourism District Act itself says nothing about eminent domain. See N.J.S.A. 5:12-219(h)(1) (stating that the purpose of Tourism District Act is "the facilitation, with minimal government direction, of the investment of private capital in the tourism district in a manner that promotes economic development"). Eminent domain only comes

into the picture with the adoption of the Project itself, and the Project is not an attempt to encourage tourism in some abstract sense. Instead, the Project calls for the use of eminent domain to take properties that are currently devoted to a mix of residential and business uses and then replace those uses with a **different** and assertedly better mix of residential and business uses. Pa224-25, describing the Tourism District Master Plan as providing for "the redevelopment and enhancement of Atlantic City" which has as an objective "to transform the Inlet District," and specifically describing the South Inlet Mixed Use Development Project as a project to "develop certain areas of the Inlet District" which may implement conceptual plans "for potential future development of the Inlet District".

Surprisingly, in its eagerness to attack the lower court's ultimate decision, CRDA abandons any pretense of defending the lower court's holding that this condemnation "has nothing directly to do with a plan to redevelop a stagnant and depressed area." Pa794. Instead, CRDA openly and repeatedly embraces the idea that it is using eminent domain for economic redevelopment. (See Pb2 (claiming that imposing a "reasonable assurances" requirement "undermines the very purpose of redevelopment – which is to restore areas of the State that are experiencing economic hardship. If redevelopment, in times of economic uncertainty, is a manifest abuse of eminent domain, then there will be no redevelopment in the State.")); id. at 15 ("The Master Plan calls for the redevelopment of several areas of Atlantic City including

the South East Inlet Neighborhood."); id. at 15-16 ("Recognizing the redevelopment of the South Inlet and Absecon Inlet as a critical part of Atlantic City's revival, the project is envisioned as . . .").) If nothing else, this Court should hold that this taking is for the purpose of economic redevelopment simply because CRDA's brief repeatedly says exactly that.

Simply put, a taking for the purpose of replacing one mix of uses with a more optimal mix of uses is a redevelopment taking that must meet the requirements of the Blighted Areas Clause, regardless of whether the underlying plan is labeled a "Tourism District" or a "Business District." Surely, the outcome of Gallenthin would not have been different if only the Borough of Paulsboro had thought to claim the taking was for "Wetland District purposes to be accomplished through redevelopment" instead of just "redevelopment." In this case, CRDA is using eminent domain for economic redevelopment, and economic-redevelopment takings are categorically forbidden in New Jersey **except** under the authority granted by the Blighted Areas Clause.

B. The court erred in finding in the alternative that even if it were an economic-redevelopment taking, the New Jersey legislature's various declarations related to Atlantic City from 1977 through 2011 constitute a finding of blight that satisfies the requirements of the Blighted Areas Clause.

In its November 17, 2014 opinion, the court below found in the alternative that, "the legislative enactments and findings are more than sufficient to satisfy the constitutional blight requirement." Pa795-96. Specifically, the lower court reached this finding based on a review of the "valid legislative findings

and declarations made over the last forty years" in a total of four statutes passed by the New Jersey Legislature:

1. the 1977 Casino Control Act, N.J.S.A. 5:12-1;
2. the 1984 Act establishing CRDA, N.J.S.A. 5:12-153 et seq.;
3. the 2001 Urban Revitalization Act, N.J.S.A. 5:12-173.1; and
4. the 2011 Tourism District Act, N.J.S.A. 5:12-218, et seq.

Pa795. The only example of such a legislative finding provided by the lower court is this quotation from the 1984 Act that created CRDA in order to: "maintain public confidence in the casino gambling industry as a unique tool of urban redevelopment for the City of Atlantic City and to directly facilitate the redevelopment of existing blighted areas." Pa796, quoting N.J.S.A. 5:12-160. This is, in fact, the only one of these four statutes to even mention "blight." Based on these four statutes, the court below found that:

> these legislative enactments unique to Atlantic City and all the findings and declarations contained in the legislation as well as the legislative history are more than sufficient to satisfy the requirements of the Blighted Areas Clause of the New Jersey Constitution if the taking of the Birnbaum property was part of a plan to redevelop a blighted area.
> [Pa796.]

It is difficult to overstate the sweeping nature of this holding. If these general legislative statements mean that the legislature has declared the Birnbaums' property blighted and subject to condemnation, they also mean that the legislature has

declared all of Atlantic City blighted and subject to condemnation. There is simply no reason to believe the legislature intended to authorize (or understood itself as having authorized) the condemnation of such a huge area under the Blighted Areas Clause.

The court below erred by: (1) failing to identify and apply the actual legal requirements for a finding of blight under New Jersey law, which are not satisfied here; and (2) concluding that these statutes, only one of which even mentions blight and none of which mention the South Inlet, could possibly meet these legal standards.

1. A finding of blight requires evidence and due process under New Jersey law, neither of which were satisfied here.

The Blighted Areas Clause "operates as both a grant and limit on the State's redevelopment authority." Gallenthin, 191 N.J. at 359. The Blighted Areas Clause "makes a finding of blight a sufficient predicate for the taking of an owner's property." Harrison Redev. Agency v. DeRose, 398 N.J. Super. 361, 392 (App. Div. 2008), certif. denied sub nom. Harrison Redev. Agency v. Harrison Eagle L.L.P., 196 N.J. 87 (2008). However, the judiciary — not a state executive agency — is the final arbiter of the meaning of constitutional terms such as "blight." See Gallenthin, 191 N.J. at 358. As such, the New Jersey Supreme Court has determined that, "[a]t its core, 'blight' includes deterioration or stagnation that has a decadent effect on surrounding property." Id. at 365. In other words,

blight findings require factual support and evidence, and cannot be made by legislative fiat.

Nowhere in CRDA's Complaint, its Declaration of Taking, or (most importantly) CRDA's Resolutions referenced therein is there any reference to "blight" or any findings of blight whatsoever. That is because the Birnbaums' property (like the rest of the properties in the Project area) has never been designated as blighted by any entity. Indeed, if the Birnbaums' property had been designated as blighted, the Birnbaums would have been constitutionally entitled to notice and an opportunity to be heard on that designation. See, e.g., Harrison, 398 N.J. Super. at 402-06 (holding that due process requires notification of property owners when their property is designated as "blighted" for purposes of future condemnation); accord Brody v. Vill. of Port Chester, 434 F.3d 121, 129 (2d Cir. 2005) (same). The Birnbaums have received no such notice because no one ever designated their property as blighted.

2. It is completely implausible that these statutes constitute a legal finding of blight.

The trial court's holding that an assortment of four declarations by the New Jersey Legislature over a 35-year period about the general condition of Atlantic City constitute "blight designations" of any kind was error. These general declarations are not designations of "blight," nor do they constitute binding factual findings that the Birnbaums' property is blighted in satisfaction of the requirements of the Blighted Areas Clause to the New Jersey Constitution. Not only do these statements fail

to cite any evidence supporting a blight finding, only one of the statements even mentions the word "blight" – and in that case, simply references "existing blighted areas" without identifying which areas are blighted. Nor do any of these statements even identify the South Inlet, much less the South Inlet Mixed Use Project area.

None of these general legislative declarations even comes close to constituting a factual finding that the Birnbaums' property – or any other property in Atlantic City – is suffering from "deterioration or stagnation that has a decadent effect on surrounding property[,]" as required by Gallenthin, 191 N.J. at 365. Blight in New Jersey is a judicial, rather than a purely legislative, determination, and declarations of blight trigger significant due-process protections for property owners. Id. at 358-59 (New Jersey courts are the final arbiter of the constitutional meaning of "blight" and the limits of the eminent domain power); Harrison, 398 N.J. Super. 402-06.

Simply put, it is impossible to believe that the New Jersey Legislature, through these general declarations, intended to create a blight designation sufficient to allow condemnations under the Blighted Areas Clause. Reading them as creating such a designation would be not only atextual and implausible but breathtakingly sweeping: If the statutes cited above are sufficient justification to condemn the Birnbaums' property as blighted, then they are equally sufficient justification to condemn **literally any** property in Atlantic City as blighted if

CRDA so wishes. There is simply no reason to believe the legislature intended to vest CRDA with such sweeping powers – and, indeed, a delegation of such completely untrammeled authority would amount to an unconstitutional **"delegation of unbridled discretion"** to CRDA, and "an abdication of the authority committed to the Legislature by the Constitution." See Wilson v. City of Long Branch, 27 N.J. 360, 378 (1958). If the Legislature wants to make a blight designation, it certainly knows how to do so - and how to do so within the constitutional confines of the Blighted Areas Clause and the Due Process Clause. It did no such thing here. The court below erred by holding otherwise, and its order denying the condemnation can therefore be affirmed on these alternate grounds.

IV. The court erred in finding that CRDA established that taking the Birnbaums' property is necessary for the South Inlet Mixed Use Development Project. (Pa789.)

Even if the court below were correct that CRDA can justify a condemnation based on wanting to encourage the private development of a Tourism District use, the court would still have erred by stopping there. Courts in New Jersey, like courts in many other states, are also required to determine whether the acquisition of a particular piece of property, even for an assertedly valid public purpose, is arbitrary. And here, the inclusion of the Birnbaums' property has many indicia of arbitrariness: The Birnbaums' property is at the very edge of the parcels CRDA sought to acquire; it is not necessary to take the Birnbaums' property in order to maintain a contiguous development

area. See Pa377; Pa900; Pa 916; Pa1059-1060. Most of the land on the Birnbaums' block is not slated for acquisition — but the Birnbaums' property is. Id. Moreover, the Birnbaums are located directly across the street from a vast swath of vacant land that was not slated for acquisition (and that, in fact, was sold at a bankruptcy auction even as CRDA sought to condemn the Birnbaums). Pa706-07. The record below provides no explanation for why the Birnbaums are slated for condemnation but these other properties (including the vacant properties) are not.

In its November 17, 2014 ruling, the lower court accepted CRDA's argument that these concerns simply did not matter — that the assertion of a public use forecloses further inquiry into why particular parcels are being condemned instead of others.

But this is not so. New Jersey courts can and do examine whether property is being taken arbitrarily. See, e.g., Burnett, 14 N.J. at 295 (noting that courts will prevent "the exercise of the power of eminent domain in excess of the public use upon which it is bottomed in a particular instance."); see also, e.g., Twp. of Bridgewater v. Yarnell, 64 N.J. 211, 214-15 (1974) (holding that property owners had made out a sufficient prima facie case that the condemnor's proposed sewer-line route was arbitrary); Twp. of W. Orange v. 769 Assocs., L.L.C., 172 N.J. 564, 578 (2002) (noting that condemnation may be set aside for abuse of discretion by condemnor). Thus, contrary to CRDA's claim, condemnors in New Jersey decidedly do **not** have limitless discretion to decide what property to condemn, and courts **do** set

aside condemnations where the inclusion of a particular piece of property is arbitrary or otherwise unjustified. See, e.g., Gallenthin, 191 N.J. at 372-73 (2007) (rejecting taking where property was not "integral to" a legitimate taking and holding that the condemnor must "establish a record that contains more than a bland recitation of applicable statutory criteria and a declaration that those criteria are met").[14]

In short, there are limitations (albeit broad ones) on how condemnors in New Jersey can go about taking land even when the underlying public use is undisputed. In Burnett, for example, the taking was for a public highway (perhaps the classic use), but the court still took care to note that the state agency had "authority to select the particular highways **within reasonable limits** on the highway route designated by the statute." 14 N.J. at 294-95 (emphasis added). In Currie, the court noted that "[c]ondemnation of either the fee, or a lesser interest, is limited to lands **reasonably necessary** for the achievement of the statutory purpose." 35 N.J. Super. at 531 (emphasis added). In Essex County v. Hindenlang, the court actually evaluated whether the taking was reasonably necessary to the public use and found

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[14] This is the law not just in New Jersey but also across the country. See Carlson, 332 P.3d 900, 907 (Utah 2014) (remanding due to the absence of any clearly articulated "public use" in the record for a taking of property in excess of that needed for a transportation project); City of Stockton v. Marina Towers L.L.C., 88 Cal. Rptr. 3d 909, 913 (Cal. Ct. App. 2009) (rejecting taking as unnecessary); State ex rel. Sun Oil Co. v. City of Euclid, 130 N.E.2d 336 (Ohio 1955) (holding that land may not be appropriated for a contemplated but undetermined future use).

that it was. 35 N.J. Super. 479, 493 (App. Div. 1955) (finding that the county "demonstrate[s] the existence of parking conditions in the vicinity of and with relation to the county buildings which required attention in the public interest, and that the measures taken to meet these conditions were properly and reasonably necessary and useful to that end").

The inclusion of the Birnbaums' property and exclusion of other property (including neighboring vacant, development-ready parcels that were actually for sale at the time) was utterly without explanation or justification — and, if there was no justification for taking the Birnbaums' property, it follows that the taking was not reasonably necessary for CRDA's purposes — or, indeed, for anything.[15] The trial court's decision to the contrary was error, and its order denying the condemnation can therefore be affirmed on this alternate ground.

V. The court erred in finding there was a valid public use for the taking of the Birnbaums' property. (Pa776; Pa797.)

Finally, the lower court's ruling that CRDA had articulated a valid public use justifying the taking of the Birnbaums'

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[15] Evidence adduced at the evidentiary hearing confirms that the Birnbaums' stated concerns here were correct. As described above, CRDA developed a massing plan to guide development in the South Inlet that designated some areas for current development and others for "FUTURE DEVELOPMENT." Everything CRDA sought to condemn when it acquired properties for the Project was designated for development on that map — except the Birnbaums. The Birnbaums' property was the only piece of property designated for "FUTURE DEVELOPMENT" that CRDA sought to condemn — the remaining "FUTURE DEVELOPMENT" properties were left untouched. The record contains no explanation for why the Birnbaums were singled out for condemnation in 2014. See supra at 13.

property fails for two additional reasons. First, CRDA's application to condemn failed to provide sufficient "assurances that the public interest will be protected" when the property is turned over to a private developer. Second, CRDA's underlying plan failed to undertake the kind of careful planning process required by the United States Supreme Court's decision in Kelo v. City of New London, 545 U.S. 469 (2005).

A. CRDA has failed to provide adequate assurances of public rather than private use.

As mentioned above (and discussed in CRDA's opening brief), in Casino Reinvestment Development Authority v. Banin, 320 N.J. Super. 342 (L. Div. 1998), the court held that where there is a proposal to take property, there must be "adequate assurances" of future public use – specifically, that where private property is to be transferred from one private owner to another, there must be a legally binding agreement that commits the new private owner to put the property to an agreed public use. Id. at 353. In Banin, CRDA sought to condemn private property to turn over to a private developer who (as a legal matter) would have been allowed to build anything at all once the developer owned the property. Id. The Banin court found this violated New Jersey law – while it accepted that the asserted use would have been "public use" for purposes of condemnation, it held that the absence of any legally binding restrictions on what the private developer could build made it impossible to be sure the taking would benefit the public rather than the developer's private interest.

Significantly, CRDA does not contend that Banin was wrongly

decided or that it is anything other than a proper application of New Jersey law. Pb20-22. Instead, it attempts to distinguish Banin by arguing (unlike in that case) there is no danger that this taking will primarily benefit a private interest. Id. But that is simply belied by the record before the court in its November 17, 2014 opinion, which reflected (at minimum) a high likelihood that the Birnbaums' land, if condemned, would be transferred to a private developer who would have the legal right to build anything (or nothing).[16] Simply put, the problem in Banin was that the court was concerned that property could be condemned and turned over to a private developer who would be legally allowed to build anything he wanted. The problem here is that the Birnbaums' property is likely to be turned over to a private developer who will be legally allowed to build any "Tourism District use." But, as discussed above, "Tourism District use" is synonymous with "any use in the Tourism District" – which is to say, anything the developer wants. If Banin was rightly decided, as CRDA effectively concedes, the same rule applied in that case should have applied here.

In essence, the court's November 17, 2014 opinion turns the rule of Banin on its head. While accepting that, in eminent-domain cases, New Jersey courts must scrutinize agreements with private developers to ensure that the property is being put to a

[16] This concern, too, was borne out at the 2016 evidentiary hearing, where then-CRDA Director John Palmieri admitted that CRDA might ultimately transfer the Birnbaums' property to a different private owner and that he was not sure whether CRDA would retain any ownership interest in it. Pa978, 51:8-51:21.

public use rather than primarily the developer's private benefit, it found that there was no need for similar scrutiny here because CRDA had not yet entered into an agreement with a developer. Pa797-98. But it simply cannot be the case that Banin would have come out the other way if only CRDA had thought to have no agreement with the developer at all instead of having an inadequate agreement. The lesson of Banin (and the cases on which it relies) is that courts must require some reasonable assurance that condemned property will not be used primarily for the benefit of some other private interest. Because it had no such assurances before it, the court should have dismissed the complaint on November 17, 2014. Its order denying the condemnation can therefore be affirmed on this alternative ground as well.

2. CRDA failed to meet the federal standards articulated in Kelo.

While the United States Supreme Court has held that federal law (unlike New Jersey law) allows condemnations for private economic development in the absence of blight, it has only held that they are permissible where the condemning agency has undergone an extensive planning process. As the Court noted in Kelo v. City of New London, the condemnor in that case had considered numerous possible plans and uses, and the city conducted studies and multiple public hearings when considering the plan. 545 U.S. 469, 473-74 (2005); see also Nicole Stelle Garnett, Planning as Public Use?, 34 Ecology L.Q. 443, 447 (2007) (discussing Kelo's "planning mandate" and Justice Kennedy's

concurrence "suggesting that the lack of comprehensive planning might render certain takings presumptively invalid"). The Kelo majority explicitly conditioned its approval of the condemnations in that case on "the comprehensive character of the plan [and] the thorough deliberation that preceded its adoption." Kelo, 545 U.S. at 484. Where these elements are missing, courts reject attempted condemnations. See, e.g., Middletown Twp. v. Lands of Stone, 939 A.2d 331, 338 (Pa. 2007) (concluding that "evidence of a well-developed plan of proper scope is significant proof that an authorized purpose truly motivates a taking"); Mayor & City Council of Balt. v. Valsamaki, 916 A.2d 324, 352-53 (Md. 2007) (noting absence of clear plan for the use of condemned property, and contrasting with Kelo); R.I. Econ. Dev. Corp. v. Parking Co., L.P., 892 A.2d 87, 104 (R.I. 2006) (emphasizing difference between condemnor's approach and the "exhaustive preparatory efforts that preceded the takings in Kelo").

The complaint filed below indicated neither a comprehensive plan nor thorough deliberations. See Pa1-6, complaint; see also Pa375-77, certification of Charles Birnbaum discussing his extended and fruitless efforts to discover what, if anything CRDA intended to do with his property. Not only was CRDA's initial planning inadequate, it affirmatively rebuffed a judicial request to engage in further planning: As discussed supra, the court below ordered CRDA to engage in a more extensive reevaluation of its proposed project, and CRDA refused. See supra at 8-9. At best, the record before the court when it denied the Birnbaums'

motion to dismiss indicated that CRDA had seen some "conceptual plans" of what might happen in the South Inlet and had authorized condemnations for the Project in 2012 based solely on those general concepts.[17] That does not fall within the boundaries of federal law as laid out in Kelo, and the court below should therefore have dismissed the complaint. Its order denying the taking can therefore be affirmed on this alternative ground as well.

CONCLUSION

The decision below was correct. It was correct for the reasons stated in the court's opinion (and not seriously disputed by CRDA here). And it was correct for at least four independent reasons rejected by the court below but cross-appealed in this action. For any one (and every one) of these reasons, the decision below should be affirmed.

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Counsel for Defendants/Respondents/Cross-Appellants Charles and Lucinda Birnbaum

[17] Once again, evidence adduced at the eventual evidentiary hearing in this case bears out these concerns: Even as late as 2014, CRDA's entire plan for the Birnbaums' property was to use it for unspecified "FUTURE DEVELOPMENT." (See supra at 13.)

New Jersey Judiciary
Superior Court - Appellate Division

Notice of Appeal

Type or clearly print all information. Attach additional sheets if necessary.

Title in Full (As Captioned Below)

Casino Reinvestment Development Authority, a body public and corporate of the State of New Jersey v. Charles Birnbaum, Lucinda Binrbaum; Louis Taylor Davis; Gerald Gittens; The Atlantic City Municipal Utilities Authority; The Atlantic City Sewerage Co.; and The City of Atlantic City.

Attorney/Law Firm/Pro Se Litigant

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On Appeal from

Trial Court Judge	Trial Court or State Agency	Trial Court or Agency Number
Hon. Julio J. Mendez, A.J.S.C. Atl.	Superior Ct. Law Division	ATL-L-589-14

Notice is hereby given that Casino Reinvestment Development Authority, appeals to the Appellate Division from a ☐ Judgment or ☒ Order entered on 08/05/2016, in the (select one)

☒ Civil, ☐ Criminal, or ☐ Family Part of the Superior Court ☐ Tax Court or from a ☐ State Agency decision entered on _____.

If not appealing the entire judgment, order or agency decision, specify what parts or paragraphs are being appealed.

Have all issues, as to all parties in this action, before the trial court or agency been disposed of? (In consolidated actions, all issues as to all parties in all actions must have been disposed of.) ☒ Yes ☐ No

If not, has the order been properly certified as final pursuant to *R.* 4:42-2? ☐ Yes ☐ No

For criminal, quasi-criminal and juvenile actions only:

Give a concise statement of the offense and the judgment including date entered and any sentence or disposition imposed:

This appeal is from a ☐ conviction ☐ post judgment motion ☐ post-conviction relief.

If post-conviction relief, is it the ☐ 1st ☐ 2nd ☐ other _____ (specify)

Is defendant incarcerated? ☐ Yes ☐ No

Was bail granted or the sentence or disposition stayed? ☐ Yes ☐ No

If in custody, name the place of confinement:

Defendant was represented below by:

☐ Public Defender ☐ self ☐ private counsel _____ (specify)

Notice of appeal and attached case information statement have been served where applicable on the following:

	Name	Date of Service
Trial Court Judge	Hon. Julio J. Mendez, A.J.S.C. Atl.	08/31/2016
Trial Court Division Manager	Teresa Ungaro	08/31/2016
Tax Court Administrator		
State Agency		
Attorney General or Attorney for other Governmental body pursuant to *R.* 2:5-1(a), (e) or (h)		

Other parties in this action:

Name and Designation	Attorney Name, Address and Telephone No.	Date of Service
Charles & Lucinda Birnbaum	William Potter, Esq. 194 Nassau St # 32, Princeton, NJ 08542	8/31/2016
	Robert McNamara, IFJ, 901 N. Glebe Rd, Ste 900, Arlington, VA 22203	8/31/2016

Attached transcript request form has been served where applicable on the following:

	Name	Date of Service	Amount of Deposit
Trial Court Transcript Office	Atlantic County Transcript Requests	08/31/2016	$500.00
Court Reporter (if applicable)			
Supervisor of Court Reporters			
Clerk of the Tax Court			
State Agency			

Exempt from submitting the transcript request form due to the following:

☐ No verbatim record.

☐ Transcript in possession of attorney or pro se litigant (four copies of the transcript must be submitted along with an electronic copy).

List the date(s) of the trial or hearing:

☐ Motion for abbreviation of transcript filed with the court or agency below. Attach copy.

☐ Motion for free transcript filed with the court below. Attach copy.

08/31/2016
Date

Signature of Attorney or Pro Se Litigant

Statement filed August 31 2016 by CRDA

New Jersey Judiciary
Superior Court - Appellate Division
CIVIL CASE INFORMATION STATEMENT

Please type or clearly print all information.

TITLE IN FULL (1)	TRIAL COURT OR AGENCY DOCKET NUMBER (2)
Casino Reinvestment Development Authority, a body public and corporate of the State of New Jersey v. Charles Birnbaum, Lucinda Binrbaum; Louis Taylor Davis; Gerald Gittens; The Atlantic City Municipal Utilities Authority; The Atlantic City Sewerage Co.; and The City of Atlantic City.	ATL-L-589-14

■ Attach additional sheets as necessary for any information below.

(3) APPELLANT'S ATTORNEY EMAIL ADDRESS: slederman@riker.com

■ PLAINTIFF ☐ DEFENDANT ☐ OTHER (SPECIFY)

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NAME	CLIENT
Robert McNamara	Charles & Lucinda Birnbaum

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* Indicate which parties, if any, did not participate below or were no longer parties to the action at the time of entry of the judgment or decision being appealed.

(5) GIVE DATE AND SUMMARY OF JUDGMENT, ORDER, OR DECISION BEING APPEALED AND ATTACH A COPY:
Order dated August 5, 2016 / Final order denying CRDA's right to condemn the subject property.

(6) Are there any claims against any party below, either in this or a consolidated action, which have not been disposed of, including counterclaims, cross-claims, third-party claims and applications for counsel fees? ☐ YES ■ NO

If so, has the order been properly certified as final pursuant to R. 4:42-2? (If not, leave to appeal must be sought. R. 2:2-4,2:5-6) ☐ YES ☐ NO

(If the order has been certified, attach, together with a copy of the order, a copy of the complaint or any other relevant pleadings and a brief explanation as to why the order qualified for certification pursuant to R. 4:42-2.)

Were any claims dismissed without prejudice? ■ YES ☐ NO

If so, explain and indicate any agreement between the parties concerning future disposition of those claims.
CRDA's asserted right to condemn the property at this time was dismissed with prejudice. There is no agreement between the parties.

(7) Is the validity of a statute, regulation, executive order, franchise or constitutional provision of this State being questioned? (R. 2:5-1(h)) ☐ YES ■ NO

(8) GIVE A BRIEF STATEMENT OF THE FACTS AND PROCEDURAL HISTORY:
See attached.

(9) TO THE EXTENT POSSIBLE, LIST THE PROPOSED ISSUES TO BE RAISED ON THE APPEAL AS THEY WILL BE DESCRIBED IN APPROPRIATE POINT HEADINGS PURSUANT TO R. 2:6-2(a)(5). (Appellant or cross-appellant only.):

I. The Court's factual finding that several prior South Inlet Projects Failed was not supported by adequate, substantial, credible evidence in the record.
II. The Court erred in its interpretation of CRDA's enabling statute
III. The Court erred in creating a new condemnation standard not authorized by statute or the State and Federal Constitutions
IV. The Court erred in its interpretation of the public purpose requirement
V. The Court erred in imposing a "reasonable assurances" requirement on CRDA

(10) IF YOU ARE APPEALING FROM A JUDGMENT ENTERED BY A TRIAL JUDGE SITTING WITHOUT A JURY OR FROM AN ORDER OF THE TRIAL COURT, COMPLETE THE FOLLOWING:

1. Did the trial judge issue oral findings or an opinion? If so, on what date? _____ ☐ YES ■ NO

2. Did the trial judge issue written findings or an opinion? If so, on what date? August 5, 2016 ■ YES ☐ NO

3. Will the trial judge be filing a statement or an opinion pursuant to R. 2:5-1(b)? ■ YES ☐ NO

Caution: Before you indicate that there was neither findings nor an opinion, you should inquire of the trial judge to determine whether findings or an opinion was placed on the record out of counsel's presence or whether the judge will be filing a statement or opinion pursuant to R. 2:5-1(b).

DATE OF YOUR INQUIRY: August 30, 2016

1. IS THERE ANY APPEAL NOW PENDING OR ABOUT TO BE BROUGHT BEFORE THIS COURT WHICH:

(11) (A) Arises from substantially the same case or controversy as this appeal? ☐ YES ■ NO

(12) (B) Involves an issue that is substantially the same, similar or related to an issue in this appeal? ☐ YES ■ NO

(13) 2. WAS THERE ANY PRIOR APPEAL INVOLVING THIS CASE OR CONTROVERSY? ☐ YES ■ NO

(14) IF THE ANSWER TO EITHER 1 OR 2 ABOVE IS YES, STATE:
Case Name: Appellate Division Docket Number:

Civil appeals are screened for submission to the Civil Appeals Settlement Program (CASP) to determine their potential for settlement or, in the alternative, a simplification of the issues and any other matters that may aid in the disposition or handling of the appeal. Please consider these when responding to the following question. A negative response will not necessarily rule out the scheduling of a preargument conference.

(15) State whether you think this case may benefit from a CASP conference. ☐ YES ■ NO

Explain your answer:
Appellant is a State Agency. The Court's order curtails the agency's powers under its enabling statute.

(16) I certify that confidential personal identifiers have been redacted from documents now submitted to the court, and will be redacted from all documents submitted in the future in accordance with Rule 1:38-7(b).

(17) Casino Reinvestment Development Authority
Name of Appellant or Respondent

(18) Stuart M. Lederman, Riker Danzig Scherer Hylan
Name of Counsel of Record
(or your name if not represented by counsel)

(19) August 31, 2016
Date

(20) _____
Signature of Counsel of Record
(or your signature if not represented by counsel)

Appendix to Item Number 8 – Overview of acts

In 2011, the New Jersey Legislature and Governor Christie adopted the Atlantic City Tourism District Act. The Act charges CRDA with implementing redevelopment projects in the Atlantic City Tourism District in order to foster tourism and promote the City as a destination resort. One of the projects undertaken by CRDA pursuant to the Act is the "South Inlet Mixed Use Development Project". As with all CRDA redevelopment projects, CRDA's primary role in this project is to develop a vision and then assemble a development ready parcel that can be marketed to qualified developers.

This matter arises from CRDA's acquisition of one of the parcel's needed for the Project – the Birnbaum property. After duly negotiating with the Birnbaum's to acquire the property pursuant to N.J.S.A. 20:3-19, CRDA commenced a condemnation action on February 11, 2014 by the filing of a Verified Complaint, Declaration of Taking and Order to Show Cause. On November 17, 2014, the Court granted CRDA's order to show cause and expressly found that the Project constituted a valid public purpose (the promotion of tourism) and was not subject to a "reasonable assurances" measure.

On November 24, 2014, the Birnbaums moved for reconsideration. The Court granted the Birnbaum's motion some nine months later on August 19, 2015 and Ordered CRDA to provide "reasonable assurances" that the Project would be completed. At this point, the Court had been holding up CRDA's ability to develop the project for over a year. Tautologically, the Court based its decision primarily on the erroneous conclusion that CRDA would not be able complete the Project - due to perceived funding shortages - and also on the grounds that Atlantic City was experiencing financial uncertainty.

The Court held an evidentiary hearing on April 26, 2016, during which CRDA explained that Atlantic City's financial distress was the impetus for redevelopment projects – not a reason to prohibit them. CRDA also explained that, despite the Court's concerns about future funding, the land assemblage phase of the Project was already completely funded. CRDA further explained that CRDA has additional financial resources to support one or more development initiatives and that pending legislation would not prevent the project from moving forward.

The Court rejected CRDA's explanation and erroneously denied CRDA the right to the take Property for the reasons set forth in the Court's August 5, 2016 opinion.

New Jersey Judiciary
Superior Court - Appellate Division
Cross **Notice of Appeal**

Notice of Cross-Appeal
Filed September 15, 2016

Type or clearly print all information. Attach additional sheets if necessary.

Title in Full (As Captioned Below)	Attorney/Law Firm/Pro Se Litigant
Casino Reinvestment Development Authority, a public corporate body of the State of New Jersey v. Charles Birnbaum; Lucinda Birnbaum; Louis Taylor Davis; Gerald Gittens; The Atlantic City Municipal Utilities Authority; The Atlantic City Sewerage Co.; The City of Atlantic City.	Name: Peter Dickson/Potter and Dickson Street Address: 194 Nassau Street City: Princeton | State: NJ | Zip: 08542 | Telephone Number: 609-921-9555 Email Address: dicksonpd@cs.com

On Appeal from

Trial Court Judge	Trial Court or State Agency	Trial Court or Agency Number
Hon. Julio L. Mendez, A.J.S.C.	Superior Court, Law Division	ATL-L-589-14

Notice is hereby given that Charles Birnbaum and Lucinda Birnbaum, appeals to the Appellate Division from a ☐ Judgment or ☒ Order entered on 08/05/2016, in the (select one)

☒ Civil, ☐ Criminal, or ☐ Family Part of the Superior Court ☐ Tax Court or from a ☐ State Agency decision entered on _____.

If not appealing the entire judgment, order or agency decision, specify what parts or paragraphs are being appealed.

This is a cross-appeal of the prior Order and Opinion in this case issued on November 17, 2014. The final order in this case was entered on August 5, 2016.

Have all issues, as to all parties in this action, before the trial court or agency been disposed of? (In consolidated actions, all issues as to all parties in all actions must have been disposed of.) ☒ Yes ☐ No

If not, has the order been properly certified as final pursuant to *R.* 4:42-2? ☐ Yes ☐ No

For criminal, quasi-criminal and juvenile actions only:

Give a concise statement of the offense and the judgment including date entered and any sentence or disposition imposed:

This appeal is from a ☐ conviction ☐ post judgment motion ☐ post-conviction relief.

If post-conviction relief, is it the ☐ 1st ☐ 2nd ☐ other _____ (specify)

Is defendant incarcerated? ☐ Yes ☐ No

Was bail granted or the sentence or disposition stayed? ☐ Yes ☐ No

If in custody, name the place of confinement:

FILED
APPELLATE DIVISION
SEP 15 2016

Defendant was represented below by:
☐ Public Defender ☐ self ☐ private counsel _____ (specify)

Notice of appeal and attached case information statement have been served where applicable on the following:

	Name	Date of Service
Trial Court Judge	Honorable Julio L. Mendez, A.J.S.C.	9/15/16
Trial Court Division Manager	Teresa Ungaro	9/15/16
Tax Court Administrator		
State Agency		
Attorney General or Attorney for other Governmental body pursuant to *R.* 2:5-1(a), (e) or (h)		

Other parties in this action:

Name and Designation	Attorney Name, Address and Telephone No.	Date of Service
Plaintiff, Casino Reinvestment Development Authority	Stuart M. Lederman, 1 Speedwell Avenue, Morristown, NJ 07962, (973) 451-8456	9/14/16

Attached transcript request form has been served where applicable on the following:

Name	Date of Service	Amount of Deposit
Trial Court Transcript Office		
Court Reporter (if applicable)		
Supervisor of Court Reporters		
Clerk of the Tax Court		
State Agency		

Exempt from submitting the transcript request form due to the following:

☐ No verbatim record.

☐ Transcript in possession of attorney or pro se litigant (four copies of the transcript must be submitted along with an electronic copy).

List the date(s) of the trial or hearing:

☐ Motion for abbreviation of transcript filed with the court or agency below. Attach copy.

☐ Motion for free transcript filed with the court below. Attach copy.

September 14, 2016
Date

Signature of Attorney or Pro Se Litigant

Cross-appeal Appendix VII A-19-16 T 1

New Jersey Judiciary
Superior Court - Appellate Division
Civil Case Information Statement

Civil Case Information Statement filed Sept. 15 2016 by Charles Birnbaum et al.

Please type or clearly print all information.

Title in Full	Trial Court or Agency Docket Number
See attached.	ATL-L-589-14

• Attach additional sheets as necessary for any information below.

Appellant's Attorney Email Address: dicksonpd@cs.com

☐ Plaintiff ■ Defendant ☐ Other (Specify)

Name	Client			
Peter Dickson	Charles Birnbaum, Lucinda Birnbaum			
Street Address	**City**	**State**	**Zip**	**Telephone Number**
194 Nassau Street	Princeton	NJ	08542	609-921-9555

Respondent's Attorney* Email Address: slederman@riker.com

Name	Client			
Stuart M. Lederman	Casino Reinvestment Development Authority			
Street Address	**City**	**State**	**Zip**	**Telephone Number**
1 Speedwell Avenue	Morristown	NJ	07962	973-451-8456

* Indicate which parties, if any, did not participate below or were no longer parties to the action at the time of entry of the judgment or decision being appealed.

Give Date and Summary of Judgment, Order, or Decision Being Appealed and Attach a Copy:

August 5, 2016 final Order denying the CRDA's right to condemn the subject property.
November 17, 2014 Order and Opinion of the Court granting the CRDA's application to exercise its power of eminent domain.

Are there any claims against any party below, either in this or a consolidated action, which have not been disposed of, including counterclaims, cross-claims, third-party claims and applications for counsel fees? ☐ Yes ■ No

If so, has the order been properly certified as final pursuant to *R.* 4:42-2? (If not, leave to appeal must be sought. *R.* 2:2-4,2:5-6) ☐ Yes ☐ No

(If the order has been certified, attach, together with a copy of the order, a copy of the complaint or any other relevant pleadings and a brief explanation as to why the order qualified for certification pursuant to *R.* 4:42-2.)

Were any claims dismissed without prejudice? ☐ Yes ■ No

If so, explain and indicate any agreement between the parties concerning future disposition of those claims.

Is the validity of a statute, regulation, executive order, franchise or constitutional provision of this State being questioned? (*R.* 2:5-1(h)) ☐ Yes ■ No

Give a Brief Statement of the Facts and Procedural History:

See attached appendix.

FILED.
APPELLATE DIVISION
SEP 15 2016
CLERK

To the extent possible, list the proposed issues to be raised on the appeal as they will be described in appropriate point headings pursuant to *R.* 2:6-2(a)(6). (Appellant or cross-appellant only.):

See attached appendix.

If you are appealing from a judgment entered by a trial judge sitting without a jury or from an order of the trial court, complete the following:

1. Did the trial judge issue oral findings or an opinion? If so, on what date? _____ ☐ Yes ☒ No
2. Did the trial judge issue written findings or an opinion? If so, on what date? August 5, 2016 ☒ Yes ☐ No
3. Will the trial judge be filing a statement or an opinion pursuant to *R.* 2:5-1(b)? ☐ Yes ☒ No

Caution: Before you indicate that there was neither findings nor an opinion, you should inquire of the trial judge to determine whether findings or an opinion was placed on the record out of counsel's presence or whether the judge will be filing a statement or opinion pursuant to *R.* 2:5-1(b).

Date of Your Inquiry: _____

1. Is there any appeal now pending or about to be brought before this court which:
   (A) Arises from substantially the same case or controversy as this appeal? ☒ Yes ☐ No
   (B) Involves an issue that is substantially the same, similar or related to an issue in this appeal? ☒ Yes ☐ No
2. Was there any prior appeal involving this case or controversy? ☒ Yes ☐ No

If the answer to either 1 or 2 above is Yes, state:

Case Name:	Appellate Division Docket Number:
Casino Reinvestment Development Authority v. Birnbaum, et al.	A-19-16

Civil appeals are screened for submission to the Civil Appeals Settlement Program (CASP) to determine their potential for settlement or, in the alternative, a simplification of the issues and any other matters that may aid in the disposition or handling of the appeal. Please consider these when responding to the following question. A negative response will not necessarily rule out the scheduling of a preargument conference.

State whether you think this case may benefit from a CASP conference. ☒ Yes ☐ No
Explain your answer:

This is a dispute over the right to take, not the valuation of the property, but the Birnbaums still have no idea what the CRDA actually wants to do with their property and would appreciate an explanation of the specific purpose for the condemnation.

Whether or not an opinion is approved for publication in the official Court Reporter books, the Judiciary posts all Appellate Division opinions on the Internet.

I certify that confidential personal identifiers have been redacted from documents now submitted to the court, and will be redacted from all documents submitted in the future in accordance with Rule 1:38-7(b).

Charles Birnbaum, Lucinda Birnbaum	Peter Dickson
Name of Appellant or Respondent	Name of Counsel of Record (or your name if not represented by counsel)
September 14, 2016	
Date	Signature of Counsel of Record (or your signature if not represented by counsel)

Appendix to Civil Case Information Statement

Item No. 8

The property in question is a multi-level residential townhouse at 311 Oriental Avenue in Atlantic City, NJ, which abuts two mid-rise apartment buildings. The home has been in the Birnbaum family since 1969. Defendant Charlie Birnbaum's parents lived in the property for decades, and Mr. Birnbaum helped to care for them there until they passed away. Mr. Birnbaum rents the two upper floors to two long-time tenants and maintains the first floor as a shrine to the memory of his parents and as a base of operations for his piano tuning business.

In February 2014, the Casino Reinvestment Development Authority (CRDA) filed a condemnation action against the Birnbaum property. The CRDA sought to take the home in service of an idea named the "South Inlet Mixed Use Development Project," which is part of the CRDA's efforts to promote tourism and aid the casino industry in Atlantic City. The CRDA could not identify any particular use to which the Birnbaum property would be put. The CRDA's apparent immediate plans for the property involve "land banking" the property for a future, unspecified development. The CRDA made no findings of blight regarding the Birnbaum property. The property is located on the extreme edge of the project area at the end of a "thumb" jutting out from the rest of the plan, and is not necessary to maintain a contiguous project area. Most of the properties on the same block as the Birnbaum property are not part of the South Inlet Mixed Use Development Project.

The Birnbaums challenged the taking of their property by filing an Answer and a Brief in Response to the Order to Show Cause in May 2014 raising constitutional arguments challenging the validity of the purported public use for the taking, the necessity of the taking, the failure of the taking to comply with the Blighted Areas Clause, and the CRDA's failure to provide adequate assurances of future public use. After several rounds of hearings and briefing, the Court initially granted the CRDA's application to exercise eminent domain and denied the Birnbaum's motion to dismiss the Complaint on November 17, 2014. (The Birnbaums' cross appeal relates to this November 17, 2014 order and opinion.)

The Birnbaums filed a Motion for Reconsideration on November 25, 2014 in light of new developments related to the findings in a November 12, 2014 Update Report of Governor's Advisory Commission on New Jersey Gaming, Sports, and Entertainment, which recommended a new direction for the revitalization of Atlantic City, and recommended reallocating the CRDA's funds from the Investment Alternative Tax to other entities.

On August 19, 2015, the Court granted the Birnbaum's motion for reconsideration and found that the CRDA was not authorized to condemn the Birnbaum property until the Court had reasonable assurances that the proposed use would be implemented in light of the uncertainty over both the various plans for Atlantic City's recovery and the ability of the CRDA to implement the plan. The Court gave the CRDA 180 days "to reevaluate the feasibility of the proposed project and to file an application with evidence to provide this Court with reasonable assurances that the project will be implemented."

This was followed by briefing and an evidentiary hearing on April 26, 2016, during which time the CRDA was given the opportunity to present evidence that would provide the court with reasonable assurances that the project would be implemented. After viewing the evidence and the briefs presented, the Court issued an order on August 5, 2016 denying the CRDA's condemnation of the Birnbaum property, finding that it was a manifest abuse of the eminent domain power and exceeds the CRDA's statutory condemnation authority.

Item No. 9

I. The Court erred in finding that the Casino Reinvestment Development Authority had articulated a sufficiently specific public use to justify the taking of the Birnbaum property under the New Jersey and United States constitutions.

a. The Court erred in finding that the Tourist District Master Plan and the South Inlet Mixed Use Development Project contain a sufficient level of specificity to satisfy the public use requirement for taking the Birnbaum Property.

b. The Court erred in finding that land banking for future, unspecified development was sufficiently specific to satisfy the public use requirement for taking the Birnbaum Property.

II. The Court erred in finding that taking the Birnbaum property was permitted under the Blighted Areas Clause of the New Jersey Constitution.

a. The Court erred in finding that this was not an economic redevelopment taking for which a finding of blight is required under the Blighted Areas Clause.

b. The Court erred in finding in the alternative that even if it were an economic redevelopment taking, the New Jersey legislature's various enactments and declarations related to Atlantic City from 1977-2011 constitute a finding of blight that satisfies the requirements of the Blighted Areas Clause.

III. The Court erred in finding that the Casino Reinvestment Development Authority established that taking the Birnbaum property is necessary for the South Inlet Mixed Use Development Project.

IV. The Court erred in finding there was a valid public use for the taking of the Birnbaum property.

a. The Court erred in finding that promoting tourism in Atlantic City and assisting the ailing gaming industry was a valid public use that satisfied the public use requirement for taking the Birnbaum property.

b. The Court erred in finding that the South Inlet Mixed Use Development Project was sufficient to justify taking the Birnbaum property under the Fifth Amendment to the United States Constitution.

c. The Court erred in finding that the doctrine of adequate assurances of future public use was not applicable to the taking of the Birnbaum property.

Statement filed Sept. 15, 2016 by Charles Birnbaum, et al., caption below

CASINO REINVESTMENT DEVELOPMENT AUTHORITY, a public corporate body of the State of New Jersey,

Plaintiff,

v.

CHARLES BIRNBAUM; LUCINDA BIRNBAUM; LOUISE TAYLOR DAVIS; GERALD GITTENS; THE ATLANTIC CITY MUNICIPAL UTILITIES AUTHORITY; THE ATLANTIC CITY SEWERAGE CO.; and THE CITY OF ATLANTIC CITY,

Defendants.

BIF, Inc. v. County Of Campbell

Court of Appeals of Kentucky

December 14, 2007, Rendered

NO. 2007-CA-000047-MR

Reporter
2007 Ky. App. Unpub. LEXIS 858 *; 2007 WL 4357409

BIF, INC. AND CHALLENGER PIPING, INC., APPELLANTS v. COUNTY OF CAMPBELL, KENTUCKY EX REL. TRANSIT AUTHORITY OF NORTHERN KENTUCKY AND TRANSIT AUTHORITY OF NORTHERN KENTUCKY, APPELLEES

Prior History: [*1] APPEAL FROM CAMPBELL CIRCUIT COURT. HONORABLE JULIE REINHARDT WARD, JUDGE. ACTION ***NO***. 01-CI-00441.

Core Terms

trial court, condemn, transit, attorney's fees, properties, bad faith, costs, condemnation proceeding, federal funding, eminent, domain

Counsel: BRIEF FOR APPELLANT: Matthew W. Fellerhoff, Emily T. Supinger, Cincinnati, Ohio; Todd V. McMurtry, Crestview Hill, Kentucky.

BRIEF FOR APPELLEE: Joseph L Baker, Debra S. Pleatman, Steven C. Martin, Covington, Kentucky.

Judges: BEFORE: DIXON AND LAMBERT, JUDGES; ROSENBLUM,[1]

Opinion by: DIXON

Opinion

AFFIRMING

DIXON, JUDGE: Appellants, BIF, Inc. and Challenger Piping, Inc., appeal from an order of the Campbell Circuit Court denying their motion for attorney's fees and costs in this eminent domain proceeding. Finding ***no*** error, we affirm.

This is the second appeal from an eminent domain proceeding wherein the trial court found that Appellees, the County of Campbell, Kentucky, ex rel. the Transit Authority of Northern Kentucky and the Transit Authority of Northern Kentucky (collectively, TANK), did not have the right to condemn property located in downtown Newport, Kentucky for the construction of a downtown transit [*2] center. A panel of this Court, in its prior opinion, set forth the procedural history as follows:

> On April 10, 2001, TANK filed a petition under KRS 416.540, et. seq., the Eminent Domain Act, and KRS 96A.080 to condemn certain properties in Newport, Kentucky (the properties). The record owner of the properties was BIF, a Kentucky corporation solely owned by William Fennell, Sr. BIF had various leases on the properties.

[1] Senior Judge Paul Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

In its petition, TANK stated that the condemnation action was "for the public interest, necessity and convenience." And the taking was "necessary for the public purpose of constructing a new transit center." TANK sought an interlocutory judgment under KRS 416.610 finding that it had the right to condemn the property and authorizing it to take possession of the properties.

BIF filed its answer and challenged TANK'S right to condemn the properties. BIF alleged that TANK had not followed the statutory procedures for instituting condemnation proceedings. In addition, BIF asserted that the properties were being taken under the guise of a public purpose. But BIF believed that the properties were being taken to assist private developers. Finally, BIF alleged that TANK instituted [*3] the condemnation proceedings in bad faith because TANK was taking too much land for its stated purpose and did not have the funding to complete the project.

Because BIF filed its answer and placed TANK's right to condemn at issue, the trial court scheduled a hearing under KRS 416.610(4). In the meantime, the parties engaged in extensive discovery.

Before the trial court conducted the right to condemn hearing, BIF made a motion for summary judgment, and TANK filed a motion to amend the petition to revise the property description and name specific lessees who had been identified during the discovery process. TANK named The Goodyear Tire & Rubber Company as an interested party by virtue of an unrecorded lease or rental agreement. The trial court granted TANK's motion to amend its petition. But because TANK filed its motion to amend the petition one week before the scheduled hearing date, the trial court was compelled to postpone the hearing. Ultimately, the trial court rescheduled the hearing for August 26, 2003.

About a month and half before the rescheduled hearing date, BIF made a motion to dismiss the amended condemnation petition or postpone the hearing. The basis of this motion was [*4] that TANK had not yet received approval for federal funding, and TANK had not completed its review under the federal National Environmental Policy Act. The trial court granted BIF's motion to continue the hearing and heard oral arguments on BIF's motion to dismiss.

One month after oral arguments, the trial court determined that TANK had ***no*** right to condemn the property it described in its amended petition. In so doing, the trial court relied on the case of Northern Kentucky Port Authority, Inc. v. Cornett, 625 S.W.2d 104, 105 (Ky. 1981) for the proposition that the right to condemn exists where "there is a reasonable assurance that the intended use will come to pass." The trial court found that TANK could not give the court such assurances in light of the fact that TANK could not obtain federal funding for the project. And the court found that the "scope, funding and impact of the transit center project now envisioned by TANK is materially different from the project that was presented to the Campbell County Fiscal Court when the Fiscal Court voted to approve this lawsuit as required by the statutes." In the end, the trial court held that the changes to the project were so substantial [*5] that it must dismiss the condemnation petition.

County of Campbell, Kentucky, ex rel. Transit Authority of Northern Kentucky; and Transit Authority of Northern Kentucky v. BIF, Inc., 2003-CA-002318-MR (March 25, 2005) (Slip op. p.1-2).

We concluded in the first appeal that the trial court erred in failing to conduct the evidentiary hearing contemplated by KRS 416.610(4). Thus, the case was remanded to the Campbell Circuit Court for a hearing and findings on TANK's right to condemn the property. *Id.*

Following an extensive hearing in September 2006, the trial court issued Findings of Fact and Conclusions of Law. The court concluded that following the loss of federal funding, TANK had not taken any steps to develop alternative plans for the transit center, nor had it developed a financial plan or appropriated funding for the project. Further, the court noted that the substantial changes to the project without approval from TANK's Board or the Campbell County Fiscal Court was evidence of "gross abuse," and was sufficient grounds for denying TANK's condemnation petition. *See* Commonwealth v. Cooksey, 948 S.W.2d 122, 44 8 Ky. L. Summary 14 (Ky.App. 1997). However, with respect to Appellants' claim for costs and attorney [*6] fees, the trial court ruled:

> In Northern Kentucky Port Authority, Inc. v. Cornett, 700 S.W.2d 392 (Ky. 1985), the Kentucky Court of Appeals held that costs and attorney fees may be awarded in a voluntary dismissal on an attempted

> condemnation case upon a finding of bad faith or unreasonable delay by the condemnor. The Court did not award attorney fees because ***no*** court had considered whether the Port Authority gave the Cornetts the runaround to cause them enormous defense expenses and wear them out, forcing some settlement in favor of the Port Authority. This Court does not believe that there is sufficient evidence that TANK was proceeding with the case in an effort to wear out the Respondents. TANK believes it has the authority to condemn as long as it has a public purpose. There is ***no*** evidence that the property sought to be condemned was picked for any purpose other than a transit center which potentially would eliminate stops and make ridership easier. Before proceeding with eminent domain TANK knew it would be met with a vigorous defense and knew the standing of the Respondents it was proceeding against. Respondents motion for attorney fees is Overruled.

Appellants thereafter appealed **[*7]** to this Court. TANK has not appealed the trial court's dismissal of its petition for condemnation.

The sole issue on appeal concerns the trial court's denial of Appellants' request for costs and attorneys fees. Appellants argue that the evidence overwhelmingly established that TANK initiated and continued the litigation for an improper purpose and that even after TANK failed to secure federal funding and it became clear it could not proceed with the transit center, TANK continued the litigation solely to avoid paying attorney's fees and costs. Appellants contend that, contrary to the trial court's conclusion, TANK acted in bad faith and should bear the financial burden incurred by Appellants in defending this action, which they state currently exceeds $650,000.

Our standard of review on appeal is whether the trial court abused its discretion in refusing to award Appellants costs and attorney's fees. The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Commonwealth v. English, 993 S.W.2d 941, 945, 46 8 Ky. L. Summary 28 (Ky. 1999)* (*citing 5 Am.Jur.2d Appellate Review § 695* (1995)).

Kentucky has long followed the "American **[*8]** Rule," that in the absence of a statute or contract expressly providing therefor, attorney fees are not allowable as costs, nor recoverable as an item of damages. *Cummings v. Covey, 229 S.W.3d 59, 61 (Ky.App. 2007)*. *See also Dulworth & Burress Tobacco Warehouse Co. v. Burress, 369 S.W.2d 129 (Ky. 1963)*; *Holsclaw v. Stephens, 507 S.W.2d 462 (Ky. 1973)*, *disapproved on other grounds by Jacobs v. Lexington-Fayette Urban County Government, 560 S.W.2d 10 (Ky. 1977)*. In fact, *KRS 453.260(5)(c)* expressly exempts proceedings involving eminent domain from the statute authorizing attorney's fees in certain actions. *See Commonwealth, Dep't of Transp., Bureau of Highways v. Knieriem, 707 S.W.2d 340 (Ky. 1986)*. Further, Kentucky case law provides that, absent bad faith or unreasonable delay, a condemnor is not liable for any damages incurred by the landowner when the condemnation proceedings are abandoned before the owner's right to compensation is vested. *Commonwealth, Department of Highways v. Fultz, 360 S.W.2d 216 (Ky. 1962)*; *Kroger Co. v. Louisville & Jefferson County Air Board, 308 S.W.2d 435 (Ky. 1957)*; *J.F. Schneider & Son, Inc. v. Watt, 252 S.W.2d 898 (Ky. 1952)*. In *Northern Kentucky Port Authority, Inc. v. Cornett, 700 S.W.2d 392, 394 (Ky. 1985)*, **[*9]** the Kentucky Supreme Court opined,

> We generally reject the idea of allowing fees and certain costs incurred in the defense of a condemnation action. When the action is completed, the condemnee recovers his expense through his award of just compensation. In the case of a successful defense, he has won and prevented the taking of his property. We do not want to place the litigants in the position of allowing a landowner to gamble on litigation rather than to accept legitimate offers of settlement. Such could increase the cost to the public of acquiring property and place an additional burden on the judicial process. However, when bad faith or unreasonable delay can be shown, and there is definite prejudice and damage to a condemnee, we see ***no*** reason to deny any recovery.

Citing to *Bernard v. Russell County Air Board, 747 S.W.2d 610 (Ky.App. 1987)*, Appellants allege that throughout the condemnation proceedings, "TANK consistently ran roughshod over BIF's civil rights, ignoring state and federal law and did so with ***no*** intention of ever building a transit center. There can be ***no*** question that this litigation was prolonged by TANK not to build a transit center but for the purpose of undue **[*10]** harassment and expense to a private citizen." As further evidence of TANK's alleged bad faith, Appellants rely upon the testimony of Jim Parsons, the former Boone County Administrator, who testified during the hearing that he was told by TANK's counsel that TANK

was proceeding with the case because it did not want to pay Appellants' attorney's fees.

In its findings of fact, the trial court herein noted that TANK attempted to negotiate a voluntary purchase of the property at issue but that BIF's owner, William Fennell, was uncooperative and refused to negotiate. The trial court found that TANK thereafter duly filed its condemnation action. However, following the loss of federal funding in 2003, TANK failed to develop a new plan or budget with regard to the transit center and took essentially ***no*** further action on the project. As such, the trial court concluded that there was not "a reasonable assurance that the [property's] intended use would come to pass," *Cornett, 625 S.W.2d at 105*, and that TANK's actions, or inaction, constituted gross abuse warranting a denial of the petition for condemnation. *Cooksey, supra.*

However, the trial court was careful to characterize TANK's conduct as a **[*11]** gross abuse rather than bad faith, because, in part, it found ***no*** evidence that TANK chose the property in question for any reason other than to develop a transit center which would eliminate stops in the area and make ridership easier. Further, like the trial court, we are not persuaded by the testimony of Jim Parsons. While Parsons claimed that counsel for TANK had conceded that it was pursuing the case to avoid paying Appellants' attorney's fees, Parsons did not provide any details as to when and where this alleged conversation took place. Moreover, as the trial court pointed out, "Mr. Parsons works for the law firm representing one of the Respondents and prepared a motion for directed verdict (citing testimony at trial) for the Respondents after a motion for separation of witnesses had been sustained." Certainly, the trial court was well within its discretion in assigning little credibility to Parsons' testimony.

We cannot conclude, based upon the evidence presented during the hearing, that the trial court abused its discretion in finding that TANK did not proceed in bad faith during the condemnation proceedings. Certainly, after the loss of federal funds, TANK's failure to take **[*12]** further action constituted gross abuse and justified the denial of its petition for condemnation. *See Commonwealth, Department of Highways v. Vandertoll, 388 S.W.2d 358 (Ky. 1964)*; *Cooksey, supra.* Notwithstanding, the trial court's decision to deny attorney fees is supported by substantial evidence. *See Sherfey v. Sherfey, 74 S.W.3d 777, 782 (Ky.App. 2002)* ("'Substantial evidence' is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people.")

Finally, TANK has challenged the trial court's consideration of TANK's financial ability to construct the transit center in ruling that Tank did not have the right to take the property in question. However, TANK did not appeal from the trial court's findings of facts and conclusions of law and thus, this Court is without jurisdiction to consider the argument. *Lewis v. Bledsoe Surface Mining Co., 798 S.W.2d 459 (Ky. 1990)*; *Standard Farm Stores v. Dixon, 339 S.W.2d 440 (Ky. 1960)*.

The Campbell Circuit Court's Findings of Fact and Conclusions of Law are affirmed.

ALL CONCUR.

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